Internal Revenue Service Restructuring and Reform Act of 1998: Expanded Relief for Innocent Spouses—at What Cost? A Feminist Perspective

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The Internal Revenue Service Restructuring and Reform Act of 1998 expands the relief available to "innocent spouses," who would otherwise be held jointly and severally liable for the taxes owed under a joint return. Joint and several liability has posed serious problems for innocent women whose husbands owe taxes but file bankruptcy or simply run from the IRS, leaving these women behind to face the consequences on their own. Because these women have likely been left behind to care for their families, they have been easy targets for the IRS in its quest to recover unpaid taxes. Many women have faced years of harassment from the IRS for the taxes that are owed, and many have been left destitute because the IRS has seized their life's savings.

In enacting the 1998 reforms, Congress sought to expand the relief available to innocent spouses, but because the reforms retain joint and several liability they will be ineffective at eliminating the Tax Code's bias against women. The reforms are in fact harmful to women, as relief requires that a woman establish that she is a victim. This is significant, because the tax laws affect how society perceives married women, how these women perceive themselves, and may further impact the choices these women make as to the role they will play in society. Another troubling aspect of the new innocent spouse provisions is that they are being administered by the IRS, the very agency that targeted innocent spouses in the first place. Despite Congress' good intentions, the 1998 Act falls short of effecting the changes necessary to establish equality for women under the U.S. tax laws, which will only be accomplished when joint and several liability is repealed in favor of a proportionate liability standard.

I. INTRODUCTION

The Internal Revenue Service Restructuring and Reform Act of 1998 (1998 Act)[1] calls for additional taxpayer rights and more effective oversight of the Internal Revenue Service (IRS).[2] The Act parallels a voluntary joint effort between the IRS and the Treasury Department to develop and implement

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* I would like to thank my parents, Joan and Fred Lund, and my husband Ken, for their love, support, and encouragement.

[1] Pub. L. No. 105-206, 112 Stat. 685 (codified as amended in scattered sections of 26 U.S.C.).

[2] *See Internal Revenue Service: Hearings Before the Senate Finance Committee*, 105th Cong. (1998) (statement of Charles A. Rossotti, Commissioner of Internal Revenue), *available in* 1998 WL 28310 [hereinafter *Internal Revenue Service*].

reforms[3] that will enable the IRS to better serve its customers—taxpayers.[4] In his statement before the Senate Finance Committee in January 1998, the Commissioner of Internal Revenue, Charles O. Rossotti, pronounced his "clear and inescapable conclusion [that] the IRS must shift its focus away from its own internal operations and think about its job from the taxpayers' point of view."[5] Rossotti supported the key provisions of the Act drafted in 1997 by the House of Representatives[6] and welcomed the possibility that it "can be the impetus for

[3] The reforms initiated by the IRS and the Treasury Department include the expansion of innocent spouse relief. While the Treasury Department had announced these initiatives even prior to the enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 [hereinafter 1998 Act], the changes were prompted by the congressional directive, contained in the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 401, 110 Stat. 1452, 1459 (1996), that the Treasury study the problems facing innocent spouses. *See* [1998 Transfer Binder] Stand. Fed. Tax Rep. (CCH) ¶ 48,859 at 79,945. In addition, the Treasury issued its report one year after the congressional deadline. *See id.* Apologizing for the delay, the Assistant Treasury Secretary assured the House Ways and Means Subcommittee on Oversight that the "tardiness" was due to the Treasury Department's desire to thoroughly analyze the issues. *See Joint Liability and its Impact on Innocent Spouses: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 105th Cong. (1998) (statement of Donald C. Lubbick, Assistant Treasury Secretary), *available in* 1998 WL 8992860, at *3 [hereinafter Lubbick, *Joint Liability and its Impact on Innocent Spouses*]. Yet many practitioners were expecting more sweeping changes than those that the Treasury finally announced. *See* Stand. Fed. Tax Rep., *supra*. The reform measures include: processing all innocent spouse claims in one location to ensure technical expertise and consistency in the application of the innocent spouse rules; special training programs to familiarize IRS employees with the innocent spouse provisions and the ways in which to assist taxpayers in preparing the necessary forms for requesting relief; and reaching out at national and local levels to abused and battered spouses who might qualify for relief under the innocent spouse provisions. *See* Lubbick, *Joint Liability and its Impact on Innocent Spouses*, *supra*.

[4] *See Internal Revenue Service*, *supra* note 2, at *2.

[5] *Id.* at 1.

[6] Internal Revenue Service Restructuring and Reform Act of 1997, H.R. 2676, 105th Cong. (1997). Rossotti supported a number of taxpayer rights provisions, including one that would give taxpayers the right to sue the government for up to $100,000 in civil damages arising out of the negligence of an IRS employee who disregards any of the Internal Revenue Code provisions or Treasury Regulations while engaged in the collection of federal income tax. *See Internal Revenue Service*, *supra* note 2, at *5–*6. Rossotti stated, however, that the applicable standard should be *gross* negligence. *See id.* at *6. The 1998 Act subsequently amended I.R.C. § 7433, which provided for up to $100,000 in civil damages arising out of the *reckless* or *intentional* disregard of any provision relating to the collection of federal income tax, see I.R.C. § 7433 (1994 & Supp. II 1996), to provide for up to $100,000 in civil damages arising from mere *negligence*, and up to $1,000,000 for *intentional* or *reckless* disregard of such provisions. *See* Pub. L. No. 105-206, § 3102, 112 Stat. 685, 730 (codified at I.R.C. § 7433(b) (West Supp. 1999)).

bringing additional change to the IRS—change that will help to accomplish . . . [this] shift in focus . . . ."[7] The Service thus pledged its commitment to self-reform and to detecting and correcting abuses.[8] Rossotti assured that "it is a new day at the IRS."[9]

One of the measures endorsed by Rossotti[10] and enacted under the 1998 Act expands the relief available to "innocent spouses" from joint and several liability stemming from a jointly-filed tax return.[11] Expanding innocent spouse protection was one of the aims of legislative reform because of the harsh and often unfair consequences to taxpayers who filed jointly and neither knew nor had a reason to know that their spouses had reported an erroneous item to the IRS that resulted in an understatement of tax.[12] According to some estimates, there are between seventy-five and eighty thousand cases every year in which the IRS is "potentially pursuing the wrong spouse" for an assessment of taxes owed.[13] Yet, many of these taxpayers have been denied relief in the past because of the inadequacies and inconsistencies of the old laws.[14] The 1998 Act repeals the

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7 *Internal Revenue Service*, *supra* note 2, at *6.

8 *See id.* at *1.

9 *Id.* at *12.

10 *See id.* at *6.

11 *See* Pub. L. No. 105-206, § 3201, 112 Stat. 685, 734 (codified at I.R.C. § 6015 (West Supp. 1999)). The Tax Code otherwise imposes joint and several liability on married couples filing jointly. *See* I.R.C. § 6013(d)(3) (West Supp. 1999).

12 *See IRS Reform: Innocent Spouse Rule*, Congressional Research Serv., July 2, 1998, *available in* 1998 WL 845794, at *1.

13 *I.R.S. Restructuring: Hearings Before the Senate Finance Committee*, 105th Cong. (Feb. 11, 1998) (statement of Elizabeth Cockrell), *available in* 1998 WL 8991946.

14 *See IRS Reform: Innocent Spouse Rule*, *supra* note 12, at *2. While testifying on the need to expand relief under the innocent spouse provision, Senator Bob Graham of Florida stated:

> Under the current tax law, if a husband and wife jointly sign a return, they are jointly responsible for any deficiency that might subsequently be found to have been the result of that filing. . . . Under the current law, there is a provision called "innocent spouse" in which a spouse can theoretically avoid that responsibility. I emphasize the word "theoretically," because the testimony we heard before the Finance Committee was that it is virtually impossible for the standards of that innocent spouse provision to be met . . . .

144 CONG. REC. S4473–74 (daily ed. May 7, 1998) (statement of Senator Bob Graham).

Other Senators who have advocated expanded relief include: Senate Finance Chairman William V. Roth, Jr. of Delaware; Charles Grassley of Iowa; Daniel Patrick Moynihan of New York; and Alfonse D'Amato of New York, "who has characterized the current system as 'preposterous.'" *See* Tom Herman, *A Different Kind of Domestic Abuse: Senate Committee* former "innocent spouse provision"[15] and enacts a new provision[16] to take its place.[17] It also amends section 66 of the Internal Revenue Code,[18] which provides limited relief for innocent spouses filing separate returns in community property states.[19]

While few question the need to expand innocent spouse protection, many critics are divided as to the appropriate form of relief.[20] The debate is whether to

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Works on a Proposal to Help Protect Innocent Divorced or Separated Spouses from the Tax Collector, CHI. TRIB., May 1, 1998, § 6 at 3.

On September 10, 1998, New York Governor George Pataki signed a similar innocent spouse bill into law, effective January 1, 1999. According to Albany's *Times Union*:

> Pataki said he had concerns the law might create a bureaucratic tangle for married couples who want to file joint returns and might be inconsistent with new federal laws. "I approve of this bill because I share the sponsors' concerns for the plight of the innocent spouse," Pataki wrote in his approval message. But he instructed the state tax department to study federal law on the issue and to minimize the burden it might place on married taxpayers.

Associated Press, *Pataki Signs Tax Bill in Spite of Concerns*, TIMES UNION, Sept. 11, 1998, at B2.

Note that the problems inherent in the old laws were compounded by the lack of publicity on innocent spouse relief and the fact that the IRS had no procedures in place for handling requests for such relief. The *Dow Jones News Service* reported:

> [T]he IRS doesn't have a specific form or procedure for divorced taxpayers to . . . claim "innocent spouse" status. Indeed, the program has such a low profile that one IRS official told the [General Accounting Office] he wasn't aware it existed. Even the GAO had trouble getting information about the program. But, based on the scant data it received, the GAO said it appears "that [the] IRS received few requests for innocent spouse relief and denied most of them."

Judith Burns, *GAO Finds Fault with IRS Handling of Innocent Spouses*, DOW JONES NEWS SERV., Feb. 24, 1998, *available in* Westlaw (DJNSPLUS), at *2.

15 *See* § 3201(e)(1), 112 Stat. at 740 (repealing I.R.C. § 6013(e) (1994)).

16 *See* I.R.C. § 6015 (West Supp. 1999).

17 *See* § 3201(a), 112 Stat. at 734.

18 *See* § 3201(b), 112 Stat. at 739.

19 *See* I.R.C. § 66(c) (West Supp. 1999).

20 The IRS and the Treasury Department conducted a study on joint return and community property issues facing divorced and separated taxpayers, and requested public comment on a number of proposals to change the law. *See Study of Certain Joint Return and Community Property Issues for Divorced and Separated Taxpayers*, I.R.S. Notice 96-19, 1996-1 C.B. 371. The proposals included replacing joint and several liability with a proportionate liability standard; basing taxpayers' obligations and liabilities on the terms set forth in divorce decrees, separation agreements, or other property settlements; reforming the innocent spouse

liberalize the innocent spouse provision or repeal it and abandon joint and several liability.[21] One consideration is the feasibility of revising the innocent spouse provision and the administrative costs that are associated with such changes.[22] But the debate has focused primarily on the question of equity and, in

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provisions; and limiting the tax-splitting rule currently in force in community property states. *See id.* Even Congress was divided as to the appropriate action to take. The House version of the I.R.S. Reform Bill, see Internal Revenue Service Restructuring and Reform Act of 1997, H.R. 2676, 105th Cong. § 321, revised the innocent spouse provision, making it easier to qualify for relief, while the Senate version repealed the exemption and replaced it with a provision allowing for a separate liability election. *See IRS Reform: Innocent Spouse Rule*, *supra* note 12, at *2. The Clinton Administration opposes modification of joint and several liability; instead it simply wants to improve the current program. *See* Burns, *supra* note 14, at *2.

21 The American Bar Association Section of Taxation Domestic Relations Committee wrote a direct response to the IRS's request for public comment on various proposals to change the law on joint and several liability under a joint return. *See* American Bar Association Section of Taxation Domestic Relations Committee, *Comments on Liability of Divorced Spouses for Tax Deficiencies on Previously Filed Joint Returns*, 50 TAX LAW. 395, 395 (1997). In its report, the Committee reprinted the following resolutions, adopted in February 1995 by the House of Delegates of the American Bar Association in its Legislative Recommendation:

> RESOLVED that the American Bar Association recommends to Congress that sections 6013(d) and (e) of the Internal Revenue Code . . . be repealed (i) to eliminate joint and several liability of a taxpayer who has signed a joint return with his or her spouse for tax on income properly attributable to his or her spouse, (ii) to substitute separate liability for tax shown to be due on the joint return, and (iii) to repeal innocent spouse relief from liability for tax on the joint return when the liability arises from erroneous items of the taxpayer's spouse;
> FURTHER RESOLVED that the American Bar Association recommends to Congress that section 66 of the Internal Revenue Code of 1986 be amended (i) to overrule the holding of *Poe v. Seaborn*, 282 U.S. 101 (1930), so that married taxpayers who live in community property states will not be individually liable for income tax on any portion of the income earned by their spouse; (ii) to refer to section 879(a), with modifications, for the purpose of attributing income to a spouse in a community property state for income tax purposes; and (iii) to repeal the provisions granting relief from tax on income attributed to the taxpayer as the taxpayer's share of community income earned by the taxpayer's spouse.

Id. While the American Bar Association's proposal would allocate the liability for a deficiency between spouses as if each had filed a separate return, this allocation would not change a couple's total liability and could not be used by either spouse to secure a refund of any portion of the tax that he or she may have already paid on behalf of the other spouse. *See id.* at 396.

22 Supporters of joint and several liability defend it on the basis of administrative convenience and even necessity; they argue that separate liability under a joint return would place too great a burden on tax collectors by requiring them to sort through income, deductions, and credits attributable to each of the spouses filing jointly. *See IRS Reform: Innocent Spouse Rule*, *supra* note 12, at *2. But critics argue that tax collectors perform these

particular, whether it is more equitable to abandon joint and several liability or to continue imposing it under all but a few exceptional circumstances.[23] The new law retains joint and several liability but expands the protections afforded to innocent spouses. While the changes are a vast improvement over the old law, a critical issue—the effects of the innocent spouse provision on women—was overlooked by Congress in its decision to retain joint and several liability and to instead reform the innocent spouse provision.

The innocent spouse provision is "intended" to provide relief for *all* innocent spouses, men and women alike.[24] However, the innocent spouse who seeks relief is almost invariably a woman,[25] a fact that Congress was well aware of when it enacted the new law.[26] In fact, it was the testimony of four women that may have

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same functions whenever they conduct an audit. *See id.* Some oppose changing the joint liability laws because of the potential cost of doing so. *See id.* The *Chicago Tribune* reported that "the Senate Finance Committee bill's fate is clouded by several factors. Among these is an estimate by the Joint Tax Committee that the proposed changes would be costly to the Treasury. Treasury officials . . . have been resisting major changes in the innocent-spouse rules . . . ." Herman, *supra* note 14, at 3. In particular, Treasury officials fear that a move towards separate liability will result in an increase in fraud and a reduction in tax revenues. *See* Burns, *supra* note 14. These were the reasons cited by Assistant Treasury Secretary Donald Lubbick, in his testimony before a House Ways and Means subcommittee, in favor of retaining joint and several liability. *See id.*

[23] Critics of joint and several liability argue that it places undue hardship on innocent spouses, that the innocent spouse provisions are vague and too difficult to apply, and that the courts have been too inconsistent in their interpretation and application of the law. *See IRS Reform: Innocent Spouse Rule*, *supra* note 12, at *2; *see also* Christopher B. Wyrick, *Till Death Do Us Part—Including Our Taxes: Inequity Abounds in Spousal Joint and Several Tax Liability and the "Innocent Spouse" Rule*, KAN. J.L. & PUB. POL'Y, Winter 1997, at 163, 179 (asserting that joint and several liability is unconscionable because "the inequities to Americans thoroughly outweigh the benefits to the government of collecting slightly more revenue").

[24] *See* 1998 Act, Pub. L. No. 105-206, § 3201(a)(1), 112 Stat. 685, 735 (1998) (codified at I.R.C. § 6015(a) (West Supp. 1999)). This new provision provides that "[any] *individual* who has made a joint return may elect to seek relief. . . ." (emphasis added). *Id.* at § 6015(a)(1).

[25] *Newsday* reported in 1994 that wives brought approximately 95% of all innocent spouse cases. *See* H.J. Cummins, *Catch 1040: Joint Returns Mean Joint Liability and in Some Cases, That Means Trouble*, NEWSDAY, Jan. 30, 1994, at 76. Professor Richard Beck of The New York University Law School testified that the IRS "attempts to collect from the wrong spouse in at least 50,000 cases a year." Rob Wells, *Senators Hear Innocent Spouses Complain About IRS Hounding: U.S. Tax System Mistreats Divorced Women, Panel Told*, SAN DIEGO UNION & TRIB., Feb. 12, 1998, at A9.

[26] Senator Bob Graham of Florida testified before a panel in 1998:

compelled the legislature to examine the situation more closely and to enact changes to the law which lessened its harmful effects.[27] But the innocent spouse provision, even as amended, is itself harmful to women. It affects not only how society perceives married women, but also how women perceive themselves. This harm has been overlooked by Congress and the IRS in their reform efforts.

This Comment is not the first to criticize provisions of the Tax Code as harmful to women.[28] Many scholars criticize the fact that the Tax Code provides

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> A typical case is that after a husband and wife have had marital discord and are divorced, the husband may have left town and is difficult to find, the IRS locates the custodial parent, typically the wife, who is more easily accessible and then the [wife] becomes responsible for 100 percent of the tax deficiency that was the result of a filing while the marriage was in place.

144 CONG. REC. S4473 (daily ed. May 7, 1998) (statement of Senator Bob Graham).

Even the hypotheticals in the innocent spouse provision indicate Congress' awareness of the prevalence of "innocent" wives. *See* H.R. CONF. REP. NO. 105-599, at 252–53 (1998). In each of the examples cited, the deficiency in tax owed is attributable to the husband, and it is the wife who is the innocent spouse. *See id.*

[27] Karen J. Andreasen, Josephine Berman, Elizabeth Cockrell, and Svetlana Pejanovic testified at a Senate Finance Committee hearing on February 11, 1998, to tell Senators about their struggles with the IRS arising out of joint and several liability. *See generally* Herman, *supra* note 14; Wells, *supra* note 25. Elizabeth Cockrell moved to the U.S. from Canada to marry her first husband and left the marriage less than three years later, with pots and pans and only $2000. *See Field Hearing on Innocent Spouse Legislation: Hearings Before the Senate*, 105th Cong. (Mar. 9, 1998) (statement of Elizabeth Cockrell regarding GAO estimates) (visited Jan. 3, 2000) <http://www.fwp.net/wifetwax/testimony.htm>. She began battling the IRS nine years after her divorce after learning that the IRS expected her to pay over half a million dollars in back taxes attributable to investments that her husband made during their brief marriage. *See id.* She subsequently founded an organization called W.I.F.E.—Women for IRS Financial Equity—and testified before the Senate Finance Committee: "I am lucky. I fought my way back and was able to earn the resources to combat the IRS. I would like to be a voice for those women who are not so fortunate." *Id.*

According to *The San Diego Union-Tribune*:

> Cockrell and three other women delivered dramatic testimony, contending they were unjustly pursued by the IRS for tax debts of their former husbands. Josephine Berman of South Orange, N.J., said she faces a $400,000 tax bill due to improper deductions made by her former husband on their 1968, 1969 and 1970 tax returns. The IRS has seized her $40,000 IRA account and has slapped a lien on her home. "I have existed under the black cloud of an immense tax debt for the last 28 years," Berman said. "I was never involved in any of my husband's business activities nor was I ever included in any business or tax decisions."

Wells, *supra* note 25 at A9. Tom Herman noted that "Senators were deeply moved by [these] stories . . . ." Herman, *supra* note 14 at 3.

[28] *See, e.g.*, Amy C. Christian, *The Joint Return Rate Structure: Identifying and*

a tax incentive for a married couple to file jointly while providing an additional incentive, via aggregation and progressive taxation, for the wife to limit her income, and imposes a higher tax differential on the wife who is a "secondary earner,"[29] thus transferring wealth from the wife to her husband.[30] This Comment, however, examines an additional result that makes just as little sense: The same woman, who as a secondary earner tends to have less control over the family's finances, ordinarily faces joint and several liability for the taxes owed on her and her husband's joint income, and relief is available under the innocent spouse provision only if she declares herself a victim.

If a woman can establish that she is naive, uneducated, abused, abandoned, that her marriage has failed, or that the assessment will cause her undue hardship (*i.e.*, that she is a victim), then she will prevail under the innocent spouse provision.[31] Thus, the innocent spouse is victimized: First, under the current tax-assessment scheme and again under the new law which promises relief from undue hardship only if she files what amounts to a petition for mercy. And, yet, where the provision does offer relief, it may disproportionately benefit those women who have access to better resources and who thus may find themselves

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Addressing the Gendered Nature of the Tax Law, 13 J.L. & POL. 241, 243 (1997) (identifying the Tax Code's disincentives for women to work); Edward J. McCaffery, *Taxing Women: How the Tax Code Discriminates Against Women and Families*, CAL. LAW., Apr. 1997, at 37, 40 (proposing "five easy answers" to eliminating the Tax Code's bias against working wives). Criticisms include the current structure of social security, nontaxation of imputed income, inadequate child-care and work-related deductions, and mandatory acceptance of fringe benefits in lieu of cash equivalents. *See id.* at 38–40.

[29] "Often, one spouse's labor force participation is considered more important to the family's welfare such that, were the family put to a choice, that spouse's job would be retained and the other spouse's job would be forfeited as secondary." Laura Ann Davis, Note, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197, 198 (1988). Women are secondary earners far more often than men. Approximately 40% of married mothers stay at home full time as compared to almost no fathers, and the average wife who *does* work earns only 60% of her husband's salary. *See* McCaffery, *supra* note 28, at 38. On average, white married women contribute 29% of their household's total income, while black married women contribute approximately 40%. *See* Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 793 (1997) (arguing that black couples are more likely to suffer "marriage penalties" and tend to pay more in such penalties than do white couples). For a discussion of "marriage penalties," see *infra* Part II.C.

[30] *See* Christian, *supra* note 28, at 279–348 (explaining how aggregation of income and income splitting substantially harm women). *See also generally infra* Part II.A-B.

[31] The Commissioner of Internal Revenue, Charles O. Rossotti, recognized: "The taxpayers affected have been among the nation's most vulnerable and will benefit significantly from the enhanced relief the restructuring legislation gave them." *Interim Guidelines for "Equitable Relief" for Innocent Spouses*, I.R.S. News Release IR-98-73 (Dec. 7, 1998), *available in* 1998 WL 857065.

in less desperate circumstances; a woman who can afford a good divorce lawyer is likely to be better informed of her rights and better able to negotiate the timing of a divorce and the terms of a settlement, so as to adequately protect herself under the innocent spouse provision.

While other writers have proclaimed the merits of abandoning the joint return in favor of a separate filing system,[32] this Comment proposes that, at a minimum, a small but important step be taken toward equity, equality, and dignity under the current Tax Code: The abandonment of joint and several liability.[33] Part II examines some of the ways in which the Tax Code discriminates against women, and discusses the reasons why joint and several liability is inequitable. Part III gives a brief sketch of the previous innocent spouse provision and underscores its failure to provide adequate and consistent relief to innocent spouses; Part III also explains the new innocent spouse provision, the scope of relief that it provides, and how, although equitable in nature, it merely furthers the victimization of women. Part IV challenges the IRS's claims of reform and examines how liberally the new innocent spouse rules will likely be applied. Part V concludes that radical change is necessary, and that the answer lies not in an expanded innocent spouse provision but rather in the abandonment of joint and several liability.

II. THE U.S. TAX CODE: A HISTORY OF VICTIMIZING WOMEN

The status of women under the U.S. tax law has always been suspect. When taxes were first imposed by the federal government,[34] women did not even constitute "persons" under the law against whom assessments could be made.[35] While women would gradually gain the "right" to be taxed as persons, they would be taxed only in ways that benefited their husbands. Today, married women are still taxed under the same dubious methods that applied more than a

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[32] *See, e.g.*, McCaffery, *supra* note 28, at 40; Davis, *supra* note 29, at 199.

[33] Today, the United States is the only "major country" that imposes joint and several liability on married couples filing jointly. In countries where married taxpayers are separately rather than jointly liable, "every person owes income tax on whatever he or she earns, married or not. 'That's the sensible rule, that's the rule in civilized countries' .... 'That's not the rule in our country.'" Cummins, *supra* note 25 (quoting Richard Beck of The New York Law School).

[34] Pursuant to its power under U.S. CONST. amend. XVI, enacted in 1913.

[35] In *Breedlove v. Suttles*, 302 U.S. 277, 282 (1937), the Supreme Court held that "[t]he tax being on persons, women may be excepted on the basis of special considerations to which they are naturally entitled." *See* Alice Kessler-Harris, *"A Principle of Law But Not of Justice": Men, Women and Income Taxes in the United States 1913–1948*, 6 S. CAL. REV. L. & WOMEN'S STUD. 331, 332 (1997).

half-century ago.[36] These methods are not only unfair—they are detrimental to the interests of *all* women. They impact women's career choices, the value that society places on women, and even their sense of self-worth.

In order to see how the Tax Code discriminates against women, it is necessary to consider the history of taxation as it relates to married women. Four phenomena will be briefly examined in this historical context: aggregation of income, income splitting, marriage penalties and bonuses, and joint and several liability.

A. *Aggregation of Income*

Under a progressive tax scheme such as the Internal Revenue Code, taxpayers who earn more income are taxed at progressively higher rates and thus pay a greater share of tax than those who earn less.[37] The Treasury Department instituted this tax scheme in the early part of the twentieth century, believing it to be equitable because it is premised on the ability to pay.[38] However, the Treasury Department also recognized that, at that time, most husbands were the sole breadwinners in their families,[39] and it feared that under a progressive tax scheme, a husband might attempt to reduce his taxes by attributing a portion of his income to his non-earning wife, who would then pay tax on "her" share of the couple's joint earnings at a lower progressive rate.[40] In effect, the income

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[36] As one commentator noted:

> If the federal government passed a law imposing steep fines on married women who tried to work outside the home, the populace would probably be outraged, and constitutional and statutory challenges would soon follow. But the deep biases of the tax system, which have just that effect, linger unchallenged and unexamined. In fact, changes that have been enacted have been more likely to make the burdens on working women worse.

McCaffery, *supra* note 28, at 38.

[37] *See, e.g.*, I.R.C. § 1 (Supp. III 1997).

[38] *See* Kessler-Harris, *supra* note 35, at 334. "All tax theorists . . . would probably agree that the ability to pay is basic to any notion of fairness in the tax system." Davis, *supra* note 29, at 222.

[39] Aggregation of income was introduced in the 1920s. As late as the mid-1940s, 80 to 85% of all married couples had only one working spouse. *See* Davis, *supra* note 29, at 205.

[40] In fact, throughout the 1920s, affluent married taxpayers attempted to pass income to their spouses by signing contracts, forming trusts, and even creating partnerships with their wives, in an effort to save on taxes. *See* Kessler-Harris, *supra* note 35, at 336. However, in *Lucas v. Earl*, 281 U.S. 111, 114–15 (1930), the Supreme Court refused to recognize a contract, at least for federal income tax purposes, under which a husband purportedly shifted

splitting would allow the husband and wife to each pay tax on a portion of the husband's earnings, and with each doing so within a lower income bracket than would otherwise apply. The Treasury Department curtailed such efforts by assessing taxes on a couple's aggregate income as if all of the income had been earned by the husband, even if a portion had been earned by his wife.[41]

Taxing a married couple's income on an aggregate basis was premised on the notion that married women did not constitute "persons" under the law.[42] A wife's identity was subsumed within her husband's.[43] Some women protested, "wish[ing] to maintain symbolic as well as actual control of their own incomes."[44] These women "had fought for property rights within marriage, struggled for suffrage and believed vigorously in economic independence."[45] Men also contested aggregation, primarily because any income that *was* attributable to their wives, whether because their wives earned the income or were contractually entitled to it, meant that they might have to pay tax on the couple's total income at a higher progressive rate.[46]

Aggregation of income became a key component of taxation at this time, when few married women worked, and was, in essence, a form of social engineering. By imposing progressively higher tax rates on a couple's aggregate income, it penalized men who married women having any claim to income of their own. Yet, the practice went unchallenged[47]and, through aggregation, the Tax Code continues to penalize dual-income families, even today. But while the effects of income aggregation and progressive taxation are felt by couples jointly, the brunt of the harm is suffered by women. Because progressive taxation creates an incentive to limit a couple's aggregate earnings in order to avoid a

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income to his wife.

41 *See* Kessler-Harris, *supra* note 35, at 335.

42 *See id.*

43 *See id.* at 332.

44 *Id.* at 334.

45 *Id.*

46 *See id.* at 335.

47 Davis explains:

> Congress' decision to treat the married couple as a taxable unit is perhaps most favorably justified as reflecting the perceived economic realities of the time—that husbands and wives tended to pool their income and services and to share expenses. In light of the fact that eighty to eighty-five percent of the married couples in the mid-1940's contained only one wage earner..., Congress' acceptance of the pooling assumption to justify its new system went largely unchallenged.

Davis, *supra* note 29, at 205 (citations omitted).

higher tax rate and because married women are more often than not the "secondary earner," it is the wife who is more likely to cut back on the hours that she works and perhaps even give up working all together.[48]

As a result, women may be marketing themselves less effectively than men. In addition, there is the prevailing perception that a married woman with children is more likely than a married man to place her family before her career, and employers are, therefore, less willing to pay a working mother as well as they are a married man.[49] Aggregation of income in the context of a progressive taxation scheme provides a disincentive for married women to develop financial independence, and the career choices that women make as a result influence employers' perceptions of women overall.[50] Aggregation of income thus has a discriminatory impact on women.

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[48] President Reagan signed the Tax Reform Act of 1986, effecting a "massive lowering of progressive marginal rates," including a drop in the highest rate from 50%, down to 28%. McCaffery, *supra* note 28, at 41. Believing that women were working because of inflation and merely to pay taxes, Reagan expected that the drop in rates would result in more women choosing to stay at home with their children. *Id.* But the lowering of progressive marginal rates actually resulted in an *increase* of married women in the labor market, thus supporting the argument that higher progressive rates *deter* women from working. *Id.* "At least in terms of the goal of getting married women to go back home, the 1986 act backfired." *Id.* Under the current tax-assessment scheme, however, dual-income families still forfeit, on average, two-thirds of the working wife's salary to taxes and work-related expenses, see *id.* at 38, and this forfeiture may influence a wife's decision to work. Davis explains the phenomenon this way:

> When married couples file jointly, the income of the second earner, typically that of the wife, is taxed at the primary earner's top marginal rate. Since her dollars are perceived as more "expensive" to the family, she must generate enough income to compensate for her absence from the home and her additional tax burden. The married woman is thus deterred from entering the labor force and the mainstream of social and political life.

Davis, *supra* note 29, at 210 (citations omitted).

[49] With the arrival of children, many women decide to stay home and many men decide to work harder—influenced in part by a tax system designed to have that effect. Employers then, perhaps unconsciously, form an opinion that female employees are less committed than their male counterparts. In fact, virtually all of the lingering salary gap between men and women stems from the effects of marriage. Single men and women are paid roughly the same wage. Following marriage, women's salaries go down while men's go up. *See* McCaffery, *supra* note 28, at 41, 77.

[50] "From a feminist perspective, this disincentive reflects a societal policy of keeping married women in the home, and thus constitutes a significant barrier to the full recognition of women as equal members of society." Davis, *supra* note 29, at 213.

B. *Income Splitting*

At first, men as well as women challenged the government's treatment of women under the tax laws.[51] The challenges brought by men were not based on any ethical concerns but rather were based on the mere fact that these men did not want to pay taxes at the higher progressive rates that would be applicable to their family's aggregate income.[52] Many of these men had a legal basis for challenging aggregation—the community property laws of the states in which they lived.

In community property states, each spouse has legal title to half of all community property income.[53] Therefore, a wife owns half of her husband's earnings. Men in community property states challenged the aggregation of income, which treated a woman's income as if it were earned entirely by her husband, on the basis that it was unconstitutional because it "threatened the principle of states' rights, and specifically the rights of states to define the ownership of property and the personhood of women."[54] In response to the counterclaims made by the common-law states that taxes should be assessed against all (male) taxpayers on an equal basis regardless of the laws of the states in which they live, husbands in community property states argued that they undertook greater burdens than did husbands in common-law states, because of the separately-vested interests of their community property wives.[55]

The Supreme Court settled the matter in *Poe v. Seaborn*,[56] holding that taxes could not be assessed against the income of both husbands and wives on an aggregate basis in community property states.[57] But because taxpayers in community property states could not be taxed on an equal basis with taxpayers in common-law states[58] and because common-law states began adopting

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[51] *See* Kessler-Harris, *supra* note 35, at 336–37.

[52] *See id.*

[53] Community property is any property acquired by a couple while married and domiciled in a community property state. *See Taxes and Marital Situations*, I.R.S. News Release FS-97-13 (Sept. 1997), *available in* 1997 WL 585426.

[54] Kessler-Harris, *supra* note 35, at 341.

[55] The "burden" imposed on husbands in community property states was the fact that community property laws rendered them powerless over their wives' share of the marital property. *See id.* at 342–43.

[56] 282 U.S. 101 (1930).

[57] *See id.* at 118.

[58] The split in income between a husband and wife in a community property state had the effect of "automatic tax-free income shifting between spouses," see Davis, *supra* note 29, at 201, which the government had sought to eradicate through the aggregation of income.

community property laws in order to avoid aggregation,[59] the Treasury Department introduced the concept of income splitting under an *optional* joint filing system: Income earned by a taxpayer in a common-law state would be split equally between him and his wife, but only for the purposes of determining the *rate* applicable to their total aggregate income.[60]

Under the income splitting scheme, a couple who files jointly is taxed at the same rate that would be applicable to a taxpayer who was married and filed separately but who made *half* of the couple's total income.[61] In effect, a jointly-filing wife is deemed to have earned half of her income plus half of her husband's, and her husband is deemed to have earned half of his income plus half of hers.[62] Each spouse is then assessed an equal amount of tax, computed by multiplying the applicable rate by the portion of income attributed to each of them.[63] Because of the potential tax savings,[64] income splitting may provide an incentive for a married couple to file jointly rather than separately. The couple may benefit from income splitting if one of the spouses—typically the wife—earns less than the other. The *less* one earns relative to the other, the *more* the

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[59] During World War II, when revenue demands were high, the maximum tax rate climbed to 94%. In an effort to help ease the financial burden imposed on taxpayers, a number of states adopted community property statutes in order to provide the tax advantages available to couples under *Poe v. Seaborn*. *See* Davis, *supra* note 29, at 202.

[60] *See* Revenue Act of 1948, ch. 168, §§ 301–303, 62 Stat. 110, 114–16 (1948), *repealed by* Internal Revenue Code of 1954, Pub. L. No. 83-591, § 7851, 68A Stat. 3, 919–22 (1954).

Income splitting is still an integral part of the Tax Code, *see, e.g., infra* note 61, but is often criticized because it provides the same tax benefits that are available to married couples in community property states without requiring the actual transfer of income or assets from one spouse to the other. Thus, "common law property states have no incentive to adopt community property laws, which are widely held to be more sympathetic to women's rights." Davis, *supra* note 29, at 198.

[61] For example, *compare* I.R.C. § 1(a) (Supp. III 1997), which gives the table of rates applicable to married individuals filing joint returns, *with* I.R.C. § 1(c) (Supp. III 1997), which gives the rates applicable to married individuals filing *separate* returns. A married couple filing jointly will pay a 15% tax on up to $36,900 of joint income, while a married individual who files *separately* will pay a 15% tax on up to *half* that amount, or $18,450. Therefore, the couple who files jointly is paying at the rate applicable to *half* of their joint income and is therefore enjoying the benefits of income splitting. Without income splitting, a married man who earns $36,900 of taxable income and files jointly with a non-earning spouse would pay at the same rate as a married individual who earns $36,900 and files a separate return—$2768 plus 28% of the excess over $18,450; in other words, an effective rate of 21.5% rather than the 15% rate that would be applicable to married couples via income splitting. The difference in rates means that income splitting will result in a tax savings of almost $2400.

[62] *See* Christian, *supra* note 28, at 257.

[63] *See id.*

[64] *See, e.g., supra* note 61 and accompanying text.

couple will likely save in taxes by filing jointly.[65]

Unfortunately, if a wife earns less than her husband, then, even if the couple realizes an overall tax savings by filing jointly, the very first dollar of her salary may be taxed at a higher rate than if she filed separately.[66] This is because her deemed income—half of her income plus half of her husband's—will exceed her actual income and thus, under the Tax Code's progressive tax scheme, may land her in a higher income bracket. By contrast, her husband's deemed income—half of his income plus half of his wife's—will be less than his actual income and may land him in a lower income bracket. The net effect is a shifting of wealth from her to her husband;[67] the wife who is earning substantially less than her husband is taxed at a higher rate than she otherwise would be if she filed separately, while her husband is taxed at a substantially lower rate than he otherwise would be if he filed separately. Thus income splitting, like aggregation of income, is a form of social engineering that rewards those men who file jointly and who have low income-earning wives,[68] and penalizes many working women who marry.[69]

In addition to the fact that wealth is shifted from the lower-income wife to her higher-income husband, the lower-income wife may be at a disadvantage when it comes to managing the family's finances. She is more likely to stay uninvolved in her husband's business dealings and may thus be unaware of what her husband is reporting, or *not* reporting, to the government on their joint return. The implications are serious for the unsuspecting wife who is jointly and severally liable for the taxes that the couple owes.[70]

C. *Marriage Penalties and Bonuses*

Depending on whether both spouses work and how much one makes relative to the other, many married couples may be hit with what is called a "marriage

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65 *See* Christian, *supra* note 28, at 257.

66 *See* Davis, *supra* note 29, at 210.

67 *See* Christian, *supra* note 28, at 242.

68 *See id.* at 275.

69 The fact that an ever-increasing number of women are working seems to suggest that these penalties are small. But the increasing number of women in the work force may simply reflect the fact that the desire of many women for economic independence and security outweighs the penalties for working. In order to weigh the real effect of the penalties on women, one must compare the number of women who currently work with the number of women who *would* work if the aggregation-of-income scheme was repealed. *See id.* at 299.

70 Joint and several liability is imposed under a joint return. *See* I.R.C. § 6013(a) (1994).

penalty."[71] Alternatively, couples may realize a tax savings—or a "marriage bonus"—because of their marital status. Empirical evidence indicates that such penalties and bonuses influence the choices people make about marriage.[72]

Marriage penalties arise in many different ways. Some penalties inhere in the tax rate tables.[73] For example, a single male and a single female may each fall within the 15% tax bracket based on their respective gross incomes. However, if they were married to one another, they might find themselves in the 28% tax bracket based on their aggregate gross income, and thus incur a penalty based on their marital status.[74] Similarly, the aggregate amount of a couple's total standard deductions is greater if they remain single, because the standard deduction for married couples is less than *twice* the deduction for single taxpayers.[75]

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[71] *See generally* Jonathan Barry Forman, *What Can Be Done About Marriage Penalties?*, 30 FAM. L.Q. 1 (1996) (proposing several solutions for eliminating marriage penalties). For two weeks during the summer of 1999, a radio ad campaign was broadcast in 17 congressional districts, urging listeners to "call their representative and 'tell them to stop the marriage tax.'" *See* Jennifer Loven, *End of "Marriage Tax" Sought*, Assoc. Press, June 24, 1999, *available in* 1999 WL 17816870, at *1. The marriage penalty amounts to an average of $1400 for 21 million married couples, and eliminating it could cost the government $340 billion in lost tax revenues over a five-year period. *See id.*

[72] *See* Brown, *supra* note 29, at 788.

[73] *See* Forman, *supra* note 71, at 5–7.

[74] For example, see I.R.C. § 1(a), (c) (Supp. III 1997). Suppose two single taxpayers each had $20,000 of adjusted gross income in 1997. Under § 1(c), each taxpayer would fall within the 15% tax bracket and would pay $3000 in taxes, for a total tax of $6000. However, if they were married to one another, their total taxable income would have been $40,000, they would have fallen within the 28% tax bracket under § 1(a), and they would have paid taxes of $5535 plus 28% of the income in excess of $36,900, for a total tax bill of $6403. Because they would have paid a total tax of only $6000 had they remained single, the married couple would have incurred a marriage penalty of $403 under the 1997 rate tables.

[75] *See* I.R.C. § 63(c)(2) (1994). For example, two single taxpayers would each take a basic standard deduction of $3000, for a total deduction of $6000. However, if they were married, whether they filed jointly or separately, they would take a total deduction of only $5000—$1000 less—and thus, under the 1997 provisions, would incur a marriage penalty to the extent of the taxes owed on the additional $1000 of gross income. In order to decrease the marriage penalty, last year the House passed an increase in the standard deduction for married couples filing jointly. *See* Loven, *supra* note 71, at *2. This increase in the standard deduction, if enacted, would decrease the average marriage penalty by about $240, at a total cost of $4 billion a year in lost tax revenues. *See id.*

Yet another example of a marriage penalty is the phaseout amount on personal exemptions; the amount that a married couple can take phases out at an aggregate gross income of less than *twice* the phaseout amount for single taxpayers. For example, under I.R.C. § 151(d)(3), personal exemptions for single taxpayers begin to phase out when the taxpayer's

These "penalties" are not intended as such but are premised on an increased ability to pay and the fact that most married couples cohabitate.[76] Because most married couples live together, they are thought to pay less in living expenses than do single taxpayers and, therefore, have more money at their disposal.[77] However, this theory ignores the reality that many single taxpayers also cohabitate—whether with a significant other, their families, or their friends—and so they, too, can realize a comparable savings in their living expenses.[78]

Dual-income families in which both spouses earn relatively equal amounts are the most susceptible to marriage penalties.[79] As discussed earlier,[80] such couples will not enjoy the benefits of income splitting because, in effect, each spouse is taxed at the same rate at which he or she would have been taxed had he or she filed separately. Thus there is no incentive, other than convenience, for filing jointly. Also, many of these same couples would pay less in taxes overall if they were single rather than married, because the tax bracket for a married couple is *proportionately* smaller—less than twice that of a single taxpayer—at any given rate.[81] Thus, many taxpayers are actually penalized when they choose to work *and* marry an equal-earning spouse.

Conversely, it is those families with greater discrepancies in spousal earnings that are the most likely to realize a marriage bonus.[82] Although the tax brackets for married taxpayers are *proportionately* smaller, they are still

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gross income exceeds $100,000, while personal exemptions for married taxpayers begin to phase out when the aggregate gross income of both spouses exceeds $150,000—an average of only $75,000 per spouse. *See* I.R.C. § 151(d)(3)(C) (1994 & Supp. III 1997). Therefore, taxpayers may lose out on the value of their personal exemptions—and thus incur a penalty—simply because they marry.

But one author warns: "Among the most egregious marriage penalties . . . in the Code, however, are those associated with the earned income credit." Forman, *supra* note 71, at 8. Such penalties are ironic considering that they arise out of a tax structure designed to impose taxes in accordance with the taxpayer's ability to pay.

[76] *See* Richard L. Elbert, Comment, *Love, God, and Country: Religious Freedom and the Marriage Penalty Tax*, 5 SETON HALL CONST. L.J. 1171, 1188 (1995).

[77] *See id.* at 1189.

[78] *See id.*

[79] *See* Brown, *supra* note 29, at 789. The average marriage bonus for households in which one spouse makes significantly more than the other is about $1300. *See* Loven, *supra* note 71, at *9.

[80] *See supra* Part II.B.

[81] For example, *compare* I.R.C. § 1(a) (Supp. III 1997) *with* § 1(c). For example, under § 1(c), a single taxpayer could earn up to $22,100 in 1997 at the 15% rate while, under § 1(a) or (d), a married couple could earn up to $36,900—an average of only $18,450 per spouse—at the 15% rate.

[82] *See* Brown, *supra* note 29, at 789.

somewhat larger than those for single taxpayers.[83] Therefore, if only one spouse works, the sole breadwinner—typically the husband—may find himself in a smaller tax bracket—and thus paying less in tax—than if he were single.[84] The higher-income spouse realizes a significant tax savings or "bonus" for having married a much lower-income (or non-earning) spouse, and there is once again a transfer of wealth from the lower-income spouse—typically the wife—to the spouse who earns more money. Thus, the marriage bonus is yet another form of social engineering, rewarding those taxpayers who marry into single-income households. Because of this potential marriage bonus, along with the potential tax savings to be derived from income splitting, many married women who earn significantly less than their husbands will agree to file a joint return and thus be held jointly and severally liable for the taxes that are owed.

D. *Joint and Several Liability*

Many married couples file joint returns in order to take advantage of the benefits of income splitting.[85] However, the cost of filing jointly is that each spouse is held jointly and severally liable for the taxes owed under a joint return.[86] Prior to the enactment of the innocent spouse provision,[87] a wife's involvement in her husband's finances was in no way determinative of her liability. If she signed the joint return, she was jointly and severally liable for the full amount of taxes owed.[88]

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[83] *See supra* note 81 and accompanying text. In 1997, a single taxpayer could have gross income of up to $22,100 at the 15% rate, while a married couple could have up to $36,900 at the 15% rate. *See supra* note 81.

[84] For example, under I.R.C. § 1(c), a single taxpayer with $30,000 in gross income in 1997 fell within the 28% tax bracket. However, if he were married and his wife's gross income did not exceed $6900—so that their total income did not exceed $36,900—the taxpayer would find himself in the 15% bracket under § 1(a) and thus realize a significant tax savings because he was married. *See* I.R.C. § 1(c) (1994 & Supp. III 1997).

[85] *Newsday* reported in 1994 that 99% of American couples file jointly in order save on taxes. *See* Cummins, *supra* note 25. For a discussion of the benefits of income splitting, see *supra* Part III.B.

[86] *See* I.R.C. § 6013(d)(3) (1994).

[87] *See* Act of Jan. 12, 1971, Pub. L. No. 91-679, § 1, 84 Stat. 2063, 2063 (enacting I.R.C. § 6013(e) (1970–71)).

[88] *See, e.g.*, Scudder v. Commissioner, 48 T.C. 36 (1967), *rev'd*, 405 F.2d 222 (6th Cir. 1968). In *Scudder*, the Tax Court held that the wife was liable for a deficiency attributable to funds her husband had embezzled from a partnership owned by the wife. The court stated, however, that it was "appalled at the harshness of this result. . . ." *See* 48 T.C. at 41. The Sixth Circuit reversed the holding on the ground that the husband had fraudulently obtained his wife's signature. *See* 405 F.2d at 227.

Joint and several liability posed serious problems for women whose husbands filed bankruptcy or simply ran from the IRS. Many of these women were readily found because they stayed behind to care for their families.[89] Joint and several liability has meant that, at the very least, many of these women would face years, even decades, of harassment from the IRS for taxes owed on income that, unbeknownst to them, their husbands failed to report under a joint return.[90] At worst, joint and several liability has meant that many women raising families on their own would be left destitute because the IRS would seize their life's savings.[91]

It was not until 1971 that Congress would respond with what it believed to be the answer to alleviating the problems associated with joint and several liability: The innocent spouse provision.[92] But even after the most recent changes, enacted in 1998,[93] the innocent spouse provision fails to address the root of the problems facing married women under the Tax Code—discrimination. Rather than amending the Tax Code so that married women are taxed on an equal basis with their husbands and without any disincentives to establishing financial independence, the innocent spouse provision merely attempts to soften the blows of discrimination and, in the process, furthers the victimization of women.

III. THE U.S. TAX CODE AND THE VICTIMIZATION OF WOMEN: A TRADITION LIVES ON THROUGH THE INNOCENT SPOUSE PROVISION

Changes were recently enacted to the innocent spouse provision[94] because relief was far too limited under the old law. But even under these newly expanded rules, the innocent spouse provision fails to give women adequate relief from the injustices of joint and several liability. The failure lies in the fact that the law extracts too high a price for relief: A woman's dignity. In order to fully appreciate the inequities of the innocent spouse provision, it is necessary to examine the shortcomings of the old law and the reasons the rules were expanded.

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[89] *See supra* note 26 and accompanying text.

[90] *See supra* note 27 and accompanying text.

[91] *See id.*

[92] *See* Act of Jan. 12, 1971, § 1.

[93] *See* 1998 Act, Pub. L. No. 105-206, § 3201, 112 Stat. 685, 734 (codified at I.R.C. § 6015 (West Supp. 1999)).

[94] *See id.*

A. *Relief for Innocent Spouses Under the Old Law: The Lucky Spouse Rule*[95]

The IRS first offered married taxpayers the option of filing a joint return in order to make filing more convenient.[96] The benefit today is that a married couple may also incur a lower tax liability on their total income than if each spouse were to file separately.[97] However, there is a cost. Section 6013(d) imposes joint and several liability on each of the spouses filing a joint return.[98] In effect, the married couple is treated as a single entity.[99]

Joint and several liability may have been imposed to avoid the complications

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[95] "[C]urrently, this provision is in such a quagmire that lawyers and tax practitioners . . . have referred to the *applicable code section as the 'lucky spouse rule'*—because it is so hard to qualify for the shelter of its safe harbor." Paul F. Wright, *Taxation—Innocent Spouse Provision—Of Erroneous Deductions and Decisions—From 6013(E) to 6015—The Knowledge Requirement and the Deduction Quagmire of the Internal Revenue Code*, 39 S. TEX. L. REV. 845, 849 (1998) (citation omitted).

[96] *See* Ted S. Biderman, *The Continued Folly of the Innocent Spouse Defense: Is it Viable?*, 45 DRAKE L. REV. 551, 552 (1997) (arguing that the IRS could relax the standards imposed under the innocent spouse provision and thus provide for expanded relief). According to Assistant Treasury Secretary Donald Lubbick, joint returns simplify the filing obligations of approximately 49 million married couples and, in turn, reduce the resources that the IRS must otherwise devote to processing returns for married couples by up to 50%. *See* Lubbick, *Joint Liability and its Impact on Innocent Spouses*, *supra* note 3.

[97] The Revenue Act of 1948 introduced "income splitting." Under the income splitting scheme, a married couple who filed jointly would be taxed at the married rate applicable to only one-half of their total income. *See* Revenue Act of 1948, ch. 168, § 301(d), 62 Stat. 110, 114. Because the tax rate schedules are progressive in nature, a lower marginal tax rate should result when the rate applicable to each spouse is so based on only one-half of the couple's total income. *See* Natalie Hoyer Keller, *Do You, Elizabeth, Promise to Pay John's Taxes? I Do: A Review of The Innocent Spouse Provisions and a Proposal for Change*, 1996 UTAH L. REV. 1065, 1068 (1996). But as Keller points out, "given the tax rates currently in effect, many double-income couples with nearly equal earnings no longer enjoy the benefits of income splitting, resulting in the so-called 'marriage penalty.'" *Id.* For a more detailed discussion of income splitting and marriage penalties and bonuses, see *supra* Parts II.B-C.

[98] The Code states that "if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several." I.R.C. § 6013(d)(3) (1994).

[99] The Bureau of Internal Revenue issued a ruling in 1923 indicating that it intended to impose joint and several liability on taxpayers filing joint returns, based on the belief that a married couple filing jointly constituted a single entity and that "a single joint return is one return of a taxable unit, not two units on one sheet of paper." I.T. 1575, II-1 C.B. 144 (1923). Joint and several liability was formally enacted under the Revenue Act of 1938, following the Ninth Circuit's rejection of joint liability in *Cole v. Commissioner*, 81 F.2d 485 (9th Cir. 1935). *See* Revenue Act of 1938, ch. 289 § 51(b), 52 Stat. 447, 476 (1938).

and costs of apportioning liability.[100] The implications are serious, considering that joint and several liability is imposed even if all of the earnings are attributable to only one spouse, and even if the couple later divorces or separates.[101] The terms of any divorce decree or separation agreement which attempt to relieve a spouse of joint and several liability will be ineffectual.[102]

Divorced or separated taxpayers may suffer even greater consequences in community property states.[103] Under community property laws, each spouse owns half of all community property and must report half of the community income on his or her return, *even if the spouses file separately*.[104] Thus, each spouse is liable for the tax on half of the other spouse's earned income even if all of the community income is attributable to only one spouse.[105] Community property laws also impact the income and assets that the IRS may look to for payment of outstanding taxes, including those tax liabilities that are attributable to only one spouse and that arose prior to the marriage.[106]

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[100] See *Cole*, 81 F.2d at 487–88, in which the IRS argued that the joint return did not segregate the income and expenses of one spouse from those of another, and it would thus be impossible to apportion liability.

[101] *See Study of Certain Joint Return and Community Property Issues for Divorced and Separated Taxpayers*, I.R.S. Notice 96-19, 1996-1 C.B. 371, *available in* 1996 WL 121250.

[102] *See id.* The General Accounting Office cites two reasons why the IRS cannot be bound by divorce decrees, namely: (1) federal tax issues are within the exclusive jurisdiction of certain federal courts and therefore could not be resolved in a divorce proceeding, which normally would fall within the jurisdiction of a state court; and (2) binding the IRS by such decrees would require the IRS to participate in all divorce settlements—of which there were 1.2 million in 1994—in order to protect its interests, and could thwart IRS collection efforts by imposing full responsibility for taxes on the spouse who, under the decree, has agreed to relinquish to the other spouse all interests in the assets against which the IRS could otherwise impose a lien. *See Joint Liability and its Impact on Innocent Spouses: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 105th Cong. (1998) (statement of Lynda D. Willis, Director of Tax Policy and Administrative Issues, General Government Division), *available in* 1998 WL 8992861 [hereinafter Willis, *Joint Liability and its Impact on Innocent Spouses*].

[103] The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. *See Taxes and Marital Situations*, *supra* note 53, at *2.

[104] *See* Poe v. Seaborn, 282 U.S. 101, 111–12 (1930).

[105] *See id.* at 112.

[106] "[S]uppose a woman divorces, remarries, and now lives in a community property state, and there are unpaid taxes from the last joint return she filed with her first husband. The IRS may levy her wages and the wages of her second husband, since—under community property laws she owns half of his income." *Taxes and Marital Situations*, *supra* note 53, at *3.

1. *The Innocent Spouse Provisions: A Brief History*

While the inequity of imposing joint and several liability on certain taxpayers who filed joint returns became more evident after World War II,[107] it was not until 1971 that Congress responded by enacting the first version of what is known as the "innocent spouse provision."[108] This new provision provided conditional relief for certain taxpayers who filed a joint return but who did not know, and had no reason to know, that their spouses had failed to disclose income to the IRS.[109] In effect, the provision absolved only those taxpayers who did not significantly benefit from a substantial understatement of tax.[110] Although equitable in nature, the innocent spouse provision was inept at providing adequate relief, due to the Tax Court's prevailing concern for lost tax

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[107] Increased awareness of the problem is attributed not only to the increases in divorce and IRS collection activities, but also to the Supreme Court's ruling in *James v. United States*, 366 U.S. 213, 224 (1961), that embezzled funds are taxable. *James* led to IRS efforts to collect taxes on embezzled funds from "innocent spouses." *See* Wright, *supra* note 95, at 853.

[108] *See* Act of Jan. 12, 1971, Pub. L. No. 91-679, § 1, 84 Stat. 2063, 2063 (enacting I.R.C. § 6013(e) (1970)).

[109] *See* I.R.C. § 6013(e)(1)(C) (1994), *repealed by* 1998 Act, Pub. L. No. 105-206, § 3201(1), 112 Stat. 740 (1998). Congress also enacted I.R.C. § 66 (1994), invalidating community property laws for federal income tax purposes and, in particular, for determining certain income attributable to an innocent spouse who filed a separate return in a community property state. *See* Miscellaneous Revenue Act of 1980, Pub. L. No. 96-605, § 101(a), 94 Stat. 3521, 3521 (codified as amended at I.R.C. § 66 (1994)). The enactment of § 66 overruled *Poe*, 282 U.S. 101 in part, by providing that tax would be assessed in full against the spouse who earned, managed, or controlled the relevant income if: (1) the spouses lived apart for the entire year; (2) the spouses filed separate returns; (3) either spouse had income which was community income; and (4) no portion of the community income was transferred from one spouse to the other during the year in question. *See* I.R.C. § 66 (1994).

[110] *See Treasury Decision 7320—Innocent Spouses*, 1974-2 C.B. 391, 392 (Jul. 30, 1974) (advising that in determining whether it is inequitable to hold the spouse liable for a deficiency, one factor to be considered is whether the spouse significantly benefited, either directly or indirectly, from the omission of income). *Compare, e.g.*, Purcell v. Commissioner, 86 T.C. 228, 243 (1986) (granting innocent spouse relief because the taxpayer did not significantly benefit from omissions of income that were attributable to her husband) *with* Winnett v. Commissioner, 96 T.C. 802, 812–13 (1991) (denying innocent spouse relief, in part, because the taxpayer received an entire tax refund, under a divorce settlement, that resulted from a substantial understatement of tax owed and thus she significantly benefited from the understatement). In *Purcell*, the husband did transfer property to the taxpayer under a large divorce settlement, but he acquired the property in years *prior* to any understatement of tax and thus the wife's acquisition of the property was not attributable to an omission of income. *See* Purcell, 86 T.C. at 243.

revenues.[111] While other sections of the Tax Code place the burden of proof on the IRS when levying penalties, the Tax Court required the taxpayer who sought relief under the innocent spouse provision to prove each of the necessary elements by a preponderance of the evidence.[112] In 1984, Congress attempted to liberalize the innocent spouse provision by extending relief beyond those cases involving the omission of income to cases involving deficiencies from disallowed deductions, credits, and basis adjustments.[113] However, this

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[111] *See* Wyrick, *supra* note 23, at 166. The IRS shared the Tax Court's concern for lost revenues. In his IRS National Taxpayer Advocate Report to Congress earlier this year, W. Val Oveson stated:

> During my years in the tax business, I became familiar with the phrase, "protecting the interests of the government." Studying RRA 98 and applying the spirit as well as the letter of the law, I am convinced that Congress liberated the IRS from this philosophy, where the phrase "protecting the interest of the government" means "maximizing the revenue to the government." It is obvious to me that Congress intends that the IRS will balance the interest of the taxpayer with the interest of the government. This balanced approach will require the IRS to walk away from issues and situations that they may not have done in the past.

IRS National Taxpayer Advocate Report to Congress: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 105th Cong. (1998) (statement of W. Val Overson, National Taxpayer Advocate of the I.R.S.), *available in* 1999 WL 8084567. The IRS is trying to change its approach by removing taxpayer penalty assessments as one of the criteria in performance evaluations. *See* I.R.S. News Release IR-98-3 (Jan. 28, 1998) (statement of Charles O. Rossotti, Commissioner of Internal Revenue, Before the Senate Finance Committee), *available in* 1998 WL 28310. Thus, there should be little incentive, if any, for the IRS regional and district offices to assess unwarranted penalties. *See id.*

In addition to being overly concerned about lost revenues, the Tax Court is less proficient in handling the innocent spouse provision because it is a court of law, not equity; yet it hears almost all of the innocent spouse cases that are tried. *See* Jerome Borison, *Alice Through a Very Dark and Confusing Looking Glass: Getting Equity from the Tax Court in Innocent Spouse Cases*, 30 FAM. L.Q. 123, 124 (1996). "In innocent spouse cases . . . the Tax Court judges are like fish out of water. Though their decisions are couched in terms of rules of law and *stare decisis*, the judges flounder around in the turbulent sea of equity, deciding cases on what appears to be an arbitrary basis." *Id.* at 125.

[112] *See* Wyrick, *supra* note 23, at 166; *see also* Sonnenborn v. Commissioner, 57 T.C. 373, 381 (1971).

[113] *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 424(a), 98 Stat. 494, 801 (1984) (amending I.R.C. § 6013(e)(2) (1982)). Congress also amended section 66, providing innocent spouse relief for certain taxpayers in community property states who might otherwise be held liable for a tax deficiency relating to an omission of community income. *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 424(b), 98 Stat. 494, 803 (enacting I.R.C. § 66(c) (Supp. III 1985)). The taxpayer seeking relief under section 66(c) must ordinarily show that the community income was derived from their spouse's separate property of which the

amendment also proved inept.[114] Its failure is attributed in part to the income limitations that Congress imposed on individuals seeking relief under the new provision.[115] In addition, the tax regulations were never revised to reflect the 1984 amendment,[116] and, because the crucial elements of the innocent spouse provision remained essentially the same,[117] the courts continued to look to the old regulations for guidance.[118] Consequently, Congress' promise of expanded relief was disappointing.[119]

The "old" innocent spouse provision failed because the statutory requirements remained too complex and the courts' interpretations too inconsistent.[120] One tax specialist advised practitioners who were handling innocent spouse cases to scrutinize case law for analogous fact situations because "[t]he innocent spouse provision is litigated often, and the decisions are replete with inconsistency, often making it possible to find favorable precedent."[121] Prior to the 1998 enactment, some commentators argued that the innocent spouse provision should be repealed and joint and several liability abandoned

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taxpayer did not know or have reason to know, and that it would be inequitable to hold the taxpayer liable. *See* I.R.C. § 66(c)(3)–(4) (1994).

[114] *Newsday* reported in 1994 that up to 99% of American couples file jointly, and 15,000 taxpayers file innocent spouse cases each year. Only 200 of those cases are appealed to the U.S. Tax Court, and in two-thirds of these the taxpayers lose. *See* Cummins, *supra* note 25. Considering that the IRS has had no procedures in place for reviewing innocent spouse claims and that many IRS employees know nothing about the provision, see *supra* note 14 and accompanying text, it is safe to say that the innocent spouse provision has been of little avail to innocent spouses.

[115] *See generally* Burns, *supra* note 14.

[116] *See* Willis, *Joint Liability and its Impact on Innocent Spouses*, *supra* note 102, at *17.

[117] *See Joint Returns*, I.R.C. § 6013, Explanation, [1998 Transfer Binder] Stand. Fed. Tax Rep. (CCH) ¶ 36,471.09.

[118] *See id.*; *see also* Purcell v. Commissioner, 86 T.C. 228, 241 (1986) (denying innocent spouse relief because the taxpayer received a "substantial benefit" from the omissions or wrongfully claimed deductions, despite the fact that the 1984 amendment *struck* the requirement that a substantial benefit could not have been received).

[119] *See* Cummins, *supra* note 25, at 76 (reporting that, each year, tens of thousands of Americans suffer the inequities of joint and several liability and that the "labyrinthian requirements" of the innocent spouse provision work against both poor taxpayers and women).

[120] *See Current Developments, Pending Legislation, Tax Treatment of Innocent Spouses*, [1998 Transfer Binder] Stand. Fed. Tax Rep. (CCH) ¶ 45,925.

[121] Silvija A. Strikis, *Elements Required for Qualifying as an Innocent Spouse Still Far from Clear*, 81 J. TAX'N 354, 359 (1994) (advising that "the decisions regarding innocent spouse status cover too broad a spectrum for clear rules to be isolated," but giving guidelines to help practitioners working with the innocent spouse provision).

altogether,[122] while others argued that the Supreme Court should reconcile the inconsistencies.[123] Everyone seemed to agree "that the defense is currently in a state of confusion."[124]

2. *Statutory Requirements Under the Old Law*

To qualify for relief under the innocent spouse provision, the taxpayer had to establish by a preponderance of the evidence[125] that he or she met certain statutory requirements, namely: (1) the taxpayer filed a joint return for the tax year in question; (2) there was a substantial understatement of tax due to grossly erroneous items on the return which were attributable to the taxpayer's spouse; (3) the taxpayer signed the return, not knowing or having reason to know of the understatement; and (4) under the facts and circumstances of the case, it would have been inequitable to hold the taxpayer liable.[126]

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[122] *See, e.g.*, American Bar Association Section of Taxation Domestic Relations Committee, *supra* note 21, at 395.

[123] *See* Biderman, *supra* note 96, at 567.

[124] *Id.*

[125] *See, e.g.*, Adams v. Commissioner, 60 T.C. 300, 303 (1973) (stating that, "[i]n order to be relieved from liability as an 'innocent spouse,' petitioner must shoulder the burden of proving that the three conditions of section 6013(e) are met and not just one of them"); Worthington v. United States, 882 F. Supp. 503, 507 (E.D.N.C. 1994).

[126] *See* I.R.C. § 6013(e) (1994), *repealed by* 1998 Act, Pub. L. No. 105-206, § 3201(e)(1), 112 Stat. 685, 740 (1998). Section 6013(e) read, in part:

> Spouse relieved of liability in certain cases—
>
> (1) In general. Under regulations prescribed by the Secretary, if—
>
> (A) a joint return has been made under this section for a taxable year,
>
> (B) on such return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse,
>
> (C) the other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there was such substantial understatement, and
>
> (D) taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such substantial understatement,
>
> then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent such liability is attributable to such substantial understatement.

Id.

a. *The Joint Return Requirement*

The taxpayer who sought reprieve under the innocent spouse provision had to first establish that a joint return was filed.[127] The courts were most lenient with this requirement; if both the taxpayer and his or her spouse signed the return, it was presumed that the couple filed jointly.[128]

If the taxpayer failed to sign the joint return, the courts imposed the "tacit consent rule" and asked whether the taxpayer intended (*i.e.* tacitly consented) to filing a joint return, based upon his or her actions.[129] In determining the intent, the courts would generally take into account the following: the couple's filing status in prior years; whether the taxpayer enjoyed any of the benefits of the joint return; and whether the joint return, as opposed to a separate return, was used to report the income and expenses attributable to the taxpayer.[130] The taxpayer who lived in a non community property state and who did not intend to file a joint return need not invoke the protections of the innocent spouse provision; such a taxpayer was held not to have filed a joint return and thus could not be held jointly and severally liable.[131]

b. *The Substantial Understatement of Tax Requirement*

The second requirement for relief under the prior innocent spouse provision was that there exist a substantial understatement of tax attributable to grossly erroneous items of the taxpayer's spouse.[132] Because the provision required an

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[127] *See id.* at § 6013(e)(1)(A).

[128] *See, e.g.*, Wilkins v. Commissioner, 19 T.C. 752, 755 (1953) (holding that if a husband and wife both sign a joint income tax return, the filing is in fact a joint return).

[129] *See* Federbush v. Commissioner, 34 T.C. 740, 757–58 (1960), *aff'd per curiam*, 325 F.2d 1, 2 (2d Cir. 1963) (holding that "whether a joint return was filed rests on the intention of the parties"); *see also* Heim v. Commissioner, 251 F.2d 44, 48–49 (1958) (holding the taxpayer liable for a tax deficiency attributable to her husband's unreported income because she had acquiesced in, and given her tacit consent to, filing a joint return).

[130] *See* Ebeling v. Commissioner, 67 T.C.M. (CCH) 3102, 3103 (1994). *Compare* Moretti v. Commissioner, 77 F.3d 637, 643 (2d Cir. 1996) (holding that the taxpayer had filed a joint return, in part because of the fact that he and his wife had always filed jointly) *with* McCord v. Granger, 201 F.2d 103, 108 (3rd Cir. 1952) (holding taxpayer to have filed a separate return, in part because of fact that his wife had independently filed her own return).

[131] *See, e.g.*, Manton v. Commissioner, 11 T.C. 831, 835–36 (1948) (holding that the taxpayer had not filed a joint return and thus was not liable for deficiencies and penalties assessed against her husband).

[132] *See* I.R.C. § 6013(e)(1)(B) (1994), *repealed by* 1998 Act, Pub. L. No. 105-206, § 3201(e)(1), 112 Stat. 685, 740.

actual understatement of tax, relief could not be granted to a taxpayer who was held jointly and severally liable for an unpaid deficiency relating to an accurate tax return, even if the taxpayer had set aside the appropriate funds and did not know that his or her spouse had otherwise disposed of the money.[133]

In order to be substantial, the understatement, not including accrued interest and penalties, had to exceed the greater of five hundred dollars or a specified percentage of the innocent spouse's adjusted gross income for the preadjustment year.[134] This limitation was criticized as arbitrary and unfair to low-income taxpayers who failed to meet the threshold and were thus denied relief.[135] The law fell short of helping those most in need, especially considering that the resulting penalties and interest often significantly outweighed the understatement.[136] In addition, some critics argued that the limitation considered the taxpayer's ability to pay or the degree of hardship suffered rather than his or her innocence, absolving the taxpayer of liability only if the tax deficiency was significant relative to the taxpayer's total adjusted gross income for the preadjustment year.[137]

The standard for "grossly erroneous items" under the innocent spouse provision[138] was also problematic.[139] The Code defined such items as either items of gross income that were attributable to the taxpayer's spouse and that were omitted from gross income,[140] or as items of deduction, credit or basis that

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[133] *See* United States v. Bingham, 78-1 U.S. Tax Cas. (CCH) ¶ 9368, at 83,869–70 (D. Conn. 1978).

[134] *See* I.R.C. § 6013(e)(3)–(4) (1994), *repealed by* 1998 Act, § 3201(e)(1). Under sections 6013(e)(4)(A) and (B), the applicable percentage threshold is 10% for adjusted gross income of up to $20,000 for the preadjustment year, and 25% for adjusted gross income in excess of $20,000 for the preadjustment year. *See id.*

[135] The threshold of $500 or, if greater, a specified percentage of the innocent spouse's adjusted gross income for the preadjustment year, had a significant impact on the number of taxpayers permitted to seek relief. For example, the General Accounting Office estimated that generally, the innocent spouse provision allowed taxpayers to seek relief only if the deficiency was at least $5000, and that this threshold may have disqualified 43,000 divorced taxpayers from innocent spouse relief in 1992. *See* Burns, *supra* note 14, at *2.

[136] *See* Biderman, *supra* note 96, at 554–55.

[137] *See* Willis, *Joint Liability and its Impact on Innocent Spouses*, *supra* note 102, at *7. Additional criticisms include the fact that a taxpayer's adjusted gross income for the preadjustment year is irrelevant to his ability to pay tax deficiencies assessed in a subsequent year, especially considering that the notice of deficiency may not be issued until several years after the year of the joint return in question. *See id.*

[138] *See* I.R.C. § 6013(e)(2) (1994), *repealed by* 1998 Act, § 3201(d)(1).

[139] *See* Willis, *Joint Liability and its Impact on Innocent Spouses*, *supra* note 102.

[140] *See* I.R.C. § 6013(e)(2)(A) (1994), *repealed by* 1998 Act, § 3201(d)(1).

were claimed in an amount that was without any basis in fact or law.[141] Thus, if the IRS made an upward adjustment to the taxpayer's gross income, the adjusted item was considered grossly erroneous. However, the taxpayer seeking relief for erroneous items of deduction, credit or basis bore the burden of proving that such items had "no basis in fact or law."[142] This standard presented particular difficulties for taxpayers, given that the Code failed to define exactly what it meant, and left it open to judicial interpretation.[143] The courts, in turn, defined "no basis in fact or law" to mean "frivolous, fraudulent or . . . phony."[144] The resultant burden placed the taxpayer in a "proverbial catch-twenty-two."[145]

c. *The Lack of Knowledge Requirement*

The third requirement for relief under the innocent spouse provision was proving that the taxpayer did not know or have reason to know of the substantial understatement.[146] The requirement was dually problematic not only because two general standards had developed, one for omission-of-income cases and the other for erroneous deduction cases, but also because judicial interpretation varied among the circuits, the Tax Court and the Court of Appeals.[147]

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[141] *See* I.R.C. § 6013(e)(2)(B) (1994), *repealed by* 1998 Act, § 3201(d)(1).

[142] *See* [1998 Transfer Binder] Stand. Fed. Tax Rep. (CCH) ¶ 45,925, at 75,854.

[143] *See* Wright, *supra* note 95, at 857. Lynda D. Willis testified on behalf of the General Accounting Office that "[t]he distinction between a deduction having no basis in fact or law versus its just being erroneous is difficult to comprehend." *See* Willis, *Joint Liability and its Impact on Innocent Spouses*, *supra* note 102, at *8.

[144] *See* Wright, *supra* note 95, at 857; *see also* Douglas v. Commissioner, 86 T.C. 758, 763 (1986) ("Ordinarily, a deduction having no basis in fact or in law can be described as frivolous, fraudulent, or, to use the word of the committee report, phony."); Purcell v. Commissioner, 826 F.2d 470, 475 (6th Cir. 1987) ("[T]he tax court has interpreted the term 'grossly erroneous items' to mean deductions or credits that are 'fraudulent,' 'frivolous,' 'phony,' or 'groundless.'").

[145] To illustrate: "If the wife is able to prove the phoniness of the deduction in the year of trial, the IRS may argue she could have done so in the year the return was filed and, therefore, she had reason to know of the understatement and should be denied relief on *that* ground." Biderman, *supra* note 96, at 556.

[146] *See* I.R.C. § 6013(e)(1)(C) (1994), *repealed by* 1998 Act, § 3201(d)(1).

[147] *See generally* Wright, *supra* note 95, at 864–66 (providing a detailed discussion of the inconsistencies in judicial interpretation). The procedures for going before the U.S. Tax Court are significantly different from those of the other federal courts. If a taxpayer cannot settle a dispute with the IRS but has *already paid* the amount in dispute, the taxpayer must sue for a refund in either the Federal District Court (a generalist court which provides the taxpayer with the option of a jury trial) or the Court of Federal Claims (a semi-expert court). Otherwise, the taxpayer can litigate his case in the U.S. Tax Court, an expert court that is the best-suited to

Generally, the Tax Court has held fast to imposing on every taxpayer the duty to review his or her tax return prior to signing.[148] Other courts have employed the "prudent taxpayer standard" in determining the taxpayer's duty to review his or her return,[149] and have held that a spouse has reason to know of a substantial understatement if "a reasonably prudent taxpayer under the circumstances at the time of signing the return could be expected to know that the tax liability stated was erroneous or that further investigation was warranted."[150] These other courts would consider: (1) the taxpayer's level of education; (2) his or her involvement in the family's financial affairs; (3) whether expenditures appeared lavish or unusual relative to the family's past levels of income, standard of living, and spending habits, which would have put the taxpayer on notice of a potential understatement; and (4) whether the taxpayer's spouse was evasive or deceitful concerning the couple's finances.[151]

The standard for a taxpayer's duty to review his or her return having been set, the majority of courts employed the "knowledge of the transaction test" for omission-of-income cases, asking "whether the spouse seeking relief knew or should have known of an income-producing transaction that the other spouse failed to report."[152] These courts imposed a duty to investigate and denied the taxpayer relief if he or she had knowledge of the underlying transaction which produced the income in question.[153] The treatment of erroneous deduction cases, on the other hand, was altogether inconsistent.[154] The Tax Court held that mere knowledge of the deduction precluded relief under the innocent spouse provision.[155] Other courts recognized that under the Tax Court's standard, relief was unattainable; the taxpayer had a duty to review the tax return, should have seen the deduction, and would have thus failed the "should have known"

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handle complex tax issues. The choice of forum will depend largely on whether the taxpayer has already paid the disputed amount and what precedent, if any, has been set in the respective courts. *See* JOEL S. NEWMAN, FEDERAL INCOME TAXATION: CASES, PROBLEMS, AND MATERIALS 10 (1998).

148 *See* Wright, *supra* note 95, at 857; *see also* Cohen v. Commissioner, 54 T.C.M. 944, 946 (1987).

149 *See, e.g.*, Wright, *supra* note 95, at 857; Kistner v. Commissioner, 18 F.3d 1521, 1521 (11th Cir. 1994); Price v. Commissioner, 887 F.2d 959, 965 (9th Cir. 1989).

150 *See Kistner*, 18 F.3d at 1527.

151 *See* Wright, *supra* note 95, at 858; *see also* Pietromonaco v. Commissioner, 3 F.3d 1342, 1345 (9th Cir. 1993); Price v. Commissioner, 887 F.2d 959, 965 (9th Cir. 1989).

152 *See, e.g.*, Wright, *supra* note 95, at 862; Reser v. Commissioner, 112 F.3d 1258, 1265 (5th Cir. 1997).

153 *See* Wright, *supra* note 95, at 862.

154 *See Reser*, 112 F.3d at 1266; *see also* Wright, *supra* note 95, at 862–69.

155 *See Reser*, 112 F.3d at 1266; *see also* Bokum v. Commissioner, 94 T.C. 126 (1990).

standard.[156] So, these courts instead chose a more equitable standard: They would inquire "whether the spouse seeking relief knew or had reason to know that the deduction would give rise to a substantial understatement"[157] and would consider the same factors—such as the taxpayer's level of education and his or her involvement in the family's financial affairs—that were relevant in omission-of-income cases to determine whether the taxpayer should have known of the erroneous deduction.[158]

d. *The Equity Requirement*

The final requirement under the innocent spouse provision was that the taxpayer had to prove that it was inequitable to hold him or her liable for the understatement.[159] Not surprisingly, this element was also problematic because it, too, was open to judicial interpretation.[160] The confusion arising out of the provision was due, in part, to language which was originally imposed under the 1971 provision: In order to relieve the taxpayer of liability, he or she could not have received a substantial benefit from the understatement.[161] The Tax Reform Act of 1984 attempted to broaden relief by removing this language.[162] However, because new regulations were never published in 1984 and because the courts continued to rely on the 1971 regulations, this "unwritten" requirement remained firmly embedded in the courts' application of the law.[163]

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[156] *See* Wright, *supra* note 95, at 867–68.

[157] *Reser*, 112 F.3d at 1266. For an additional application of this standard, see Erdahl v. Commissioner, 930 F.2d 585, 589 (8th Cir. 1991) (holding that mere knowledge of the transaction that gave rise to an erroneous deduction did not, by itself, preclude innocent spouse relief).

[158] *See* Wright, *supra* note 95, at 868; *see also Reser*, 112 F.3d at 1268, 1272 (holding that, despite her legal education, the taxpayer had no special knowledge of complex tax issues, was not involved in her husband's business affairs, did not enjoy a lavish lifestyle, and was thus entitled to relief under the innocent spouse provision).

[159] *See* I.R.C. § 6013(e)(1)(D) (1994), *repealed by* 1998 Act, Pub. L. No. 105-206, § 3201(d)(1), 112 Stat. 685, 737.

[160] *See* Wright, *supra* note 95, at 858.

[161] *See* I.R.C. § 6013(e)(1)(C) (Supp. 1971).

[162] *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 424(a), 98 Stat. 494, 801 (1984) (amending I.R.C. § 6013(e)(1)(C) (1982)).

[163] *See* Wright, *supra* note 95, at 858–59; *see also* Purcell v. Commissioner, 86 T.C. 112, 119 (1986); *supra* notes 116–18 and accompanying text. In *Purcell*, the court stated:

In determining whether the spouse significantly benefited from the understatement, the courts generally looked to see whether the spouse realized a benefit substantially different from his or her normal family lifestyle.[164] If there was a substantial difference, the courts held that the taxpayer was on notice of income that should have been reflected on the tax return and that it was equitable to hold the taxpayer liable for the benefit that he or she enjoyed.[165] The problem inherent in this requirement is the fact that equity is a principal whereby the courts may provide relief which the law otherwise cannot. Yet under the innocent spouse provision, the courts imposed this requirement as an *additional* hurdle for the innocent spouse to clear[166] rather than as a collateral measure of relief.

> Whereas the law prior to the 1984 amendment specifically referred to whether the spouse claiming relief from tax significantly benefited from the omissions from income, the present law does not specifically contain this provision. However, even though the present statute does not specifically refer to the other spouse receiving substantial benefits from the omissions or wrongfully claimed deductions, in our view it would not be inequitable to hold the other spouse liable for the deficiency if such substantial benefits were received.

Purcell, 86 T.C. at 119.

[164] *See* Biderman, *supra* note 96, at 558; *see also* Pietromonaco v. Commissioner, 3 F.3d 1342, 1345–46 (9th Cir. 1993) (granting innocent spouse relief, in part, because the taxpayer made no lavish expenditures and because her standard of living remained constant during the tax years in which there was an understatement).

[165] *See* Biderman, *supra* note 96, at 558; *see also* Stevens v. Commissioner, 872 F.2d 1499, 1501 (11th Cir. 1989) (holding the taxpayer liable because her "personal lifestyle became increasingly opulent").

[166] *See* Wright, *supra* note 95, at 859.

B. *Relief for Innocent Spouses Under the New Law: The Luckier Spouse Rule*[167]

Congress enacted section 3201 of the 1998 Act to once again broaden relief under the innocent spouse provisions, as it realized that the innocent spouse exemption "has been the subject of extensive litigation with outcomes that are sometimes inconsistent, sometimes facially inequitable, and sometimes controversial."[168] The enactment was actually a compromise between the House, which favored retaining the innocent spouse exemption but making it easier to qualify for relief, and the Senate, which would have eliminated the exemption altogether and replaced it with an election to apportion liability between joint filers.[169] What resulted in the compromise was a "hybridized version ... containing elements of both [the] Senate and House versions, but applying them in different situations."[170] In any event, the Congressional Research Service indicated in its report to Congress that reform of the innocent spouse provisions would "eliminate or modify many of the most criticized provisions of prior law ...."[171]

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[167] Advisors warn that if a taxpayer anticipates getting divorced or separated, planning ahead could increase his or her chances of success in the event that the taxpayer subsequently elects relief under the innocent spouse provision. *See generally* George G. Jones & Mark A. Luscombe, *Reform Offers Innocent Spouses Help, and New Pitfalls*, ACCT. TODAY, Sept. 28–Oct. 11, 1998, at 26. Likewise, a taxpayer entering a divorce or separation agreement should consider the fact that his or her spouse could unilaterally overturn joint and several liability at a subsequent point in time. *See id.* at 26. Taxpayers might also want to consider the timing of an anticipated divorce or separation—within two years after collection activities begin—so as to meet the deadlines for a separate liability election under the innocent spouse provision. *See id.* at 29. However, there has been some controversy about the timing of this election. *See id.* Some advisors recommend that taxpayers make a "protective" election "as a matter of course in any divorce or separation." *Id.* But others say that such an election could tip the IRS off that one of the spouses may have filed an inaccurate return and thus precipitate an audit. *See id.* There is even speculation within the IRS that such an election might be prohibited in order to prevent a flood of paperwork. *See id.* In any event, taxpayers should not pay an assessment for a deficiency without first considering a possible election under the innocent spouse provision. *See id.* at 26. If the deficiency has been paid, an election cannot be made to secure a refund. *See id.* at 29.

[168] *See IRS Reform: Innocent Spouse Rule*, *supra* note 12, at *2.

[169] *See id.*

[170] *Id.*

[171] *Id.*

1. *Who May Seek Relief Under the New Law?*

The new law applies not only to liabilities arising after July 22, 1998, but also to liabilities that remain unpaid as of that date.[172] As a result, many taxpayers who were already involved in the collection process will be entitled to seek relief under the expanded rules.[173] In order to invoke the protections of the new law, any taxpayer seeking relief for liabilities arising after July 22, 1998, under a joint return[174] must elect one of the three Rules[175] described below,[176] no later than two years after the Commissioner has initiated collection activities.[177] The collection activities must be made in such a manner so as to notify the taxpayer of the IRS's intent to collect payment of the deficiency *from that taxpayer*.[178] For tax liabilities that are outstanding as of the enactment date, the two year limitation period begins to toll on the date of the first collection

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[172] *See* 1998 Act, Pub. L. No. 105-206, § 3201(g), 112 Stat. 685, 740.

[173] In order to consider granting relief to taxpayers whose cases were pending at the time of the enactment, the IRS suspended approximately 2000 innocent spouse cases until interim guidelines for the new provisions were issued. *See Interim Guidelines for "Equitable Relief" for Innocent Spouses*, I.R.S. News Release, IR-98-73 (Dec. 7, 1998), *available in* 1998 WL 857065. The interim guidelines were issued late in December 1998, and are in effect until a formal set of guidelines is finalized. *See id.*

[174] Relief under I.R.C. § 6015 is available to taxpayers who file joint returns, whether in a community or non-community property states. *See* 1998 Act, § 3201(a) (stating in relevant part: "Any determination under this section shall be made without regard to community property laws").

[175] Rule I provides expanded relief for innocent spouses under § 6015(b); Rule II allows a separate liability election under § 6015(c) for certain divorced or legally separated taxpayers; § 6015(a)(2) entitles those taxpayers electing relief under Rule I to also elect relief under Rule II; Rule III provides equitable relief under I.R.C. § 6015(f), but an election under Rule III is conditioned on the failure of the taxpayer to qualify for relief under both Rules I and II. *See* I.R.C. § 6015 (West Supp. 1999).

[176] *See* discussion, *infra* Parts III.B.2.a-c.

[177] *See* I.R.C. § 6015(b)(1)(E), (c)(3)(B) (West Supp. 1999), respectively. Relief under Rule III requires that the taxpayer first elect, but not qualify for, relief under Rules I and II. *See* I.R.C. § 6015(f)(2). Thus, a Rule III election must essentially be made within the same time-frame as for Rules I and II.

[178] *See* [1998 Transfer Binder] Stand. Fed. Tax Rep. (CCH) ¶ 36,485 at 62,733–38. Thus, the statute of limitations would begin to toll upon the IRS's garnishment of the taxpayer's wages or notice of levy against his or her property, either activity signaling the IRS's intent to collect payment *from that taxpayer* rather than from the taxpayer's spouse. A notice of deficiency and demand for payment that is addressed to both the taxpayer and his or her spouse would not provide the taxpayer with sufficient notice that payment was sought from the taxpayer alone, and thus the period in which to make the election would not yet begin to toll. *See id.*

activity occurring after July 22, 1998.[179] Finally, under similar time frames, taxpayers in community property states who filed separate returns may seek relief under the expanded equity provisions of section 66(c).[180]

2. *Electing Innocent Spouse Relief from Liability Under a Joint Return: Rules I, II, and III.*

Under Rule I, section 6015(b) expands the relief available to taxpayers seeking innocent spouse protection and contains a modified version of the rules formerly found under section 6013(e).[181] In addition, under Rule II, section 6015(c) allows certain divorced or separated taxpayers who are assessed a tax deficiency that is attributable to the taxpayer's spouse to elect separate liability.[182] If the taxpayer proves that he or she signed the joint return under

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[179] *See* 1998 Act, § 3201(g)(2). The collection activity must be as described under *supra* note 111.

[180] *See* I.R.C. § 66(c) (1994), *amended by* 1998 Act, § 3201(b).

[181] See I.R.C. § 6015(b) (West Supp. 1999), which states in part:

> Procedures for relief from liability applicable to all joint filers.
>
> (1) In general. Under procedures prescribed by the Secretary, if—
>
> (A) a joint return has been made for a taxable year;
>
> (B) on such return there is an understatement of tax attributable to erroneous items of one individual filing the joint return;
>
> (C) the other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was such understatement;
>
> (D) taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax for such taxable year attributable to such understatements; and
>
> (E) the other individual elects (in such form as the Secretary may prescribe) the benefits of this subsection not later than the date which is 2 years after the date the Secretary has begun collection activities with respect to the individual making the election,
>
> then the other individual shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent such liability is attributable to such understatement.
>
> . . .
>
> (3) Understatement. For purposes of this subsection, the term "understatement" has the meaning given to such term by section 6662(d)(2)(A).

[182] The Code provides:

> Procedures to limit liability for taxpayers no longer married or taxpayers legally separated or not living together.

duress, the separate liability election is unavailable[183] because it will be found that a joint return was never filed and thus the taxpayer is not liable for any of the representations made on the return.[184] For those taxpayers who fail to qualify for protection under the innocent spouse and separate liability provisions, section 6015(f) may provide equitable relief under Rule III.[185]

a. *Rule I: Expanded Innocent Spouse Relief*

A taxpayer seeking innocent spouse protection for a tax deficiency will find relief under section 6015(b) if he or she can establish the following: (1) the taxpayer filed a joint return for the year in question; (2) there was an understatement of tax due to erroneous items on the return which were attributable to the taxpayer's spouse; (3) the taxpayer signed the return, not knowing or having reason to know of the understatement; and (4) under the facts

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> (1) In general. Except as provided in this subsection, if an individual who has made a joint return for any taxable year elects the application of this subsection, the individual's liability for any deficiency which is assessed with respect to the return shall not exceed the portion of such deficiency properly allocable to the individual under subsection (d).

I.R.C. § 6015(c)(1) (West Supp. 1999).

183 The Code provides:

> Election not valid with respect to certain deficiencies. If the Secretary demonstrates that an individual making an election under this subsection had actual knowledge, at the time such individual signed the return, of any item giving rise to a deficiency (or portion thereof) which is not allocable to such individual under subsection (d), such election shall not apply to such deficiency (or portion). This subparagraph shall not apply where the individual with actual knowledge establishes that such individual signed the return under duress.

I.R.C. § 6015(c)(3)(C) (West Supp. 1999).

184 *Interim Guidance for Equitable Relief from Joint and Several Liability*, I.R.S. Notice 98-61, 1998-51 I.R.B. 13, *available in* 1998 WL 858240.

185 The Code provides:

> Equitable relief. Under procedures prescribed by the Secretary, if—
> (1) taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either); and
> (2) relief is not available to such individual under subsection (b) or (c), the Secretary may relieve such individual of such liability.

I.R.C. § 6015(f) (West Supp. 1999).

and circumstances of the case, it would be inequitable to hold the taxpayer liable.[186] If the taxpayer fails to establish that he or she did not know or have reason to know of the understatement, relief may still be granted to the extent that the taxpayer did not know or have a reason to know of *any portion* of the understatement.[187] Thus, the taxpayer will be absolved of liability for that portion of the understatement for which he or she is innocent, but will be held liable for that portion for which he or she is culpable. If the IRS denies an election for innocent spouse relief or fails to make a ruling, the taxpayer may petition the Tax Court for review of the application within 90 days after the earlier of the date on which a determination is mailed by the IRS, or six months after the date on which the taxpayer filed the election.[188]

The new law relaxes the second element under the innocent spouse provision, which formerly required the taxpayer to prove that there was a substantial understatement of tax attributable to grossly erroneous items of the taxpayer's spouse.[189] Under the new law, the understatement need no longer

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[186] *See* I.R.C. § 6015(b) (West Supp. 1999).

[187] The Code provides:

> Apportionment of relief. If an individual who, but for paragraph (1)(C), would be relieved of liability under paragraph (1), establishes that in signing the return such individual did not know, and had no reason to know, the extent of such understatement, then such individual shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent that such liability is attributable to the portion of such understatement of which such individual did not know and had no reason to know.

I.R.C. § 6015(b)(2) (West Supp. 1999).

[188] The Code provides:

> Petition for review by Tax Court.
> (1) In general. In the case of an individual who elects to have subsection (b) or (c) apply—
> (A) In general. The individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section if such petition is filed during the 90-day period beginning on the date on which the Secretary mails by certified or registered mail a notice to such individual of the Secretary's determination of relief available to the individual. Notwithstanding the preceding sentence, an individual may file such petition at any time after the date which is 6 months after the date such election is filed with the Secretary and before the close of such 90-day period.

I.R.C. § 6015(e)(1)(A) (West Supp. 1999).

[189] *See* I.R.C. § 6015(e)(1)(B) (West Supp. 1999). See *supra* Part III.B.2 for a discussion of the four requirements of the "old" provision.

exceed a threshold amount, and therefore, must no longer be "substantial."[190] Thus, the provision no longer weighs the taxpayer's ability to pay the deficiency, but considers only the taxpayer's innocence. The revision also eliminates the arbitrary unfairness to poorer taxpayers for whom the threshold limit[191] or, if greater a limit set at a specified percentage of the innocent spouse's adjusted gross income for the preadjustment year, meant that relief could more likely be denied.

In addition, the item that the understatement is attributable to need not be "grossly erroneous"[192] but merely "erroneous."[193] Eliminating this threshold from the provision should mean that the same standard will be imposed for items of deduction, credit, and basis as for items of gross income, rather than a different standard as formerly prescribed by the Code under the definition of "grossly erroneous."[194] As a consequence, courts will no longer need to interpret for themselves the meaning of "no basis in fact or law" as applied to items of deduction, credit, and basis,[195] and taxpayers will no longer face the formidable task of proving a negative proposition that the items were claimed without any such basis.[196]

Under section 3201 of the 1998 Act, the Chief Counsel must clarify the tests for the third and fourth requirements under the new innocent spouse provision,[197] namely that the taxpayer seeking relief did not know or have reason to know of the erroneous item,[198] and that it is inequitable to hold the taxpayer liable for the tax deficiency.[199] Clarification of the appropriate standards should lead to greater consistency in the courts.

b. *Rule II: Separate Liability Election*

In addition to electing innocent spouse relief under Rule I, a taxpayer may be eligible for relief under section 6015(c) and have his or her liability limited to the

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190 *See* I.R.C. § 6015(b)(1)(B) (West Supp. 1999).

191 *See supra* note 135.

192 As formerly required under I.R.C. § 6013(e)(1)(B) (1994), *repealed by* 1998 Act, Pub. L. No. 105-206, § 3201(e)(1), 112 Stat. 685, 740 (1998).

193 I.R.C. § 6015(b)(1)(B) (West Supp. 1999).

194 *See* I.R.C. § 6015(e)(2) (West Supp. 1999).

195 *See* I.R.C. § 6013(e)(2)(B) (West Supp. 1999).

196 *See supra* Part III.A.2.b.

197 *See* Pub. L. No. 105-206, § 3201(a), 112 Stat. 685 (1998) (codified as amended at I.R.C. § 6015).

198 *See* I.R.C. § 6015(b)(1)(C) (West Supp. 1999).

199 *See* I.R.C. § 6015(b)(1)(D) (West Supp. 1999).

amount of the deficiency, if any, that is attributable to items allocable to him or her.[200] Under section 6015(c), the taxpayer must establish that he or she is no longer married to, is legally separated from, or was living apart for at least one year from the spouse with whom he or she filed the joint return.[201] Relief will be granted so long as the deficiency remains unpaid as of the time of the election[202] and so long as assets were not transferred between the taxpayer and his or her spouse under a fraudulent scheme.[203] In addition, relief under section 6015(c) is available only to the extent that the taxpayer did not have actual knowledge of the item giving rise to the deficiency,[204] and to the extent that the liability exceeds the value of disqualified assets.[205]

The taxpayer bears the burden of establishing the proper allocation of items

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[200] *See* I.R.C. § 6015(c)(1) (West Supp. 1999).

[201] The Code provides:

> Election.
> (A) Individuals eligible to make election.
> (i) In general. An individual shall only be eligible to elect the application of this subsection if—
> (I) at the time such election is filed, such individual is no longer married to, or is legally separated from, the individual with whom such individual filed the joint return to which the election relates; or
> (II) such individual was not a member of the same household as the individual with whom such joint return was filed at any time during the 12-month period ending on the date such election is filed.

I.R.C. § 6015(c)(3) (West Supp. 1999).

[202] *See* I.R.C. § 6015(c)(1). The interim guidelines provide the following exception:

> An individual is eligible to be considered for relief in the form of a refund for liabilities for: (a) amounts paid on or after July 22, 1998, and on or before April 15, 1999; and (b) installment payments, made after July 22, 1998, pursuant to an installment agreement entered into with the Service and with respect to which an individual is not in default, that are made after the claim for relief is requested....

I.R.S. Notice 98-61, 1998-51 I.R.B. 13, § 3.01(4).

[203] The Code provides that: "If the Secretary demonstrates that assets were transferred between individuals filing a joint return as part of a fraudulent scheme by such individuals, an election under this subsection by either individual shall be invalid (and section 6013(d)(3) shall apply to the joint return)." I.R.C. § 6015(c)(3)(A)(ii) (West Supp. 1999).

[204] *See* I.R.C. § 6015(c)(3)(C) (West Supp. 1999).

[205] *See* I.R.C. § 6015(c)(4)(A) (West Supp. 1999). "Disqualified assets" are assets transferred to the taxpayer by his or her spouse with the principal purpose of avoiding taxes or the payment thereof. *Id.* at § 6015(c)(4)(B).

that give rise to the deficiency.[206] The taxpayer must establish the allocation in accordance with rules specified by the Commissioner,[207] but the allocation will generally be what it would have been had the taxpayer and his or her spouse filed separately.[208] If the IRS denies an election for separate liability, or fails to make a ruling, the taxpayer may petition the Tax Court for review of the application within ninety days after the earlier of the date on which a determination is mailed by the IRS, or six months after the date on which the taxpayer filed the election.[209]

c. *Rule III: Equitable Relief*

Section 6015(f) may provide equitable relief for taxpayers who fail to qualify for relief under sections 6015(b) and (c),[210] but for whom, "taking into account all the facts and circumstances, it is inequitable to hold . . . [him or her] liable for any unpaid tax or any deficiency" arising from a joint return.[211] For example, relief would be denied under sections 6015(b) and (c), but might be granted under section 6015(f), if the correct tax liability was in fact reported on the joint return, but the taxpayer seeking relief did not know or have reason to know that the deficiency remained unpaid, and that his or her spouse disposed of the money for their own benefit.[212] Rule III, in effect, may provide a safety net

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206 The Code provides that: "Except as provided in subparagraph (A)(ii) or (C) of paragraph (3), each individual who elects the application of this subsection shall have the burden of proof with respect to establishing the portion of any deficiency allocable to such individual." I.R.C. § 6015(c)(2) (West Supp. 1999).

207 The Code provides that: "The Secretary shall prescribe such regulations as are necessary to carry out the provisions of this section, including—(1) regulations providing methods for allocation of items other than the methods under subsection (d)(3) . . . ." I.R.C. § 6015(g)(1) (West Supp. 1999).

208 The Code provides: "Except as provided in paragraphs (4) and (5), any item giving rise to a deficiency on a joint return shall be allocated to individuals filing the return in the same manner as it would have been allocated if the individuals had filed separate returns for the taxable year." I.R.C. § 6015(d)(3)(A) (West Supp. 1999).

Note, however, that if an item of deduction or credit was properly taken under a joint return and is disallowed only because the returns are recomputed separately, the item will nonetheless be allowed, and will be appropriately allocated between the taxpayer and his or her spouse. *See id.* at § 6015(d)(4).

209 *See* I.R.C. § 6015(e)(1)(A) (West Supp. 1999).

210 *See* I.R.C. § 6015(f)(2) (West Supp. 1999).

211 I.R.C. § 6015(f)(1) (West Supp. 1999).

212 *See Interim Guidance for Equitable Relief from Joint and Several Liability*, I.R.S. Notice 98-61, 1998-51 I.R.B. 13, § 2.05, *available in* 1998 WL 858240 (acknowledging the legislature's intent to provide for such relief).

for those taxpayers who do not otherwise qualify for relief even under the relaxed standards of the new innocent spouse provision.

Interim guidance has been issued by the IRS, effective December 7, 1998, for those taxpayers seeking equitable relief under section 6015(f).[213] These guidelines are to be relied on until procedures are prescribed by the Chief Counsel and until permanent guidelines are issued.[214] According to the interim guidelines, taxpayers seeking section 6015(f) relief must first establish that they filed a joint return for the year in question[215] and that relief under sections 6015(b) and (c) is unavailable.[216] In addition: (1) the liability must be one which remains unpaid at the time of the application for relief; (2) relief is not available if assets were transferred as part of a fraudulent scheme between the taxpayer and the spouse with whom he or she filed jointly; and (3) relief from liability is available only to the extent that such liability exceeds the value of disqualified assets.[217]

In particular, the taxpayer seeking relief under section 6015(f) for an unpaid tax liability that was correctly reported on a joint return will need to establish each of the following: (1) the liability had not been paid as of the date the return was filed; (2) the taxpayer seeking relief is no longer married to, is legally separated from, or has been living apart for at least one year from the spouse with whom he or she filed the joint return; (3) the taxpayer filed the joint return not knowing or having reason to know that the tax would not be paid, and it was reasonable for the taxpayer to believe that his or her spouse would in fact pay the full amount owed; and (4) the taxpayer would suffer undue hardship if he or she were denied relief.[218]

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213 *See generally id.*

214 *See* I.R.C. § 5 (1994).

215 *See* I.R.S. Notice 98-61, at § 3.01(1).

216 *See id.* at § 3.01(2).

217 *See id.* at § 3.01(4)–(6). "Disqualified assets" are defined in I.R.C. § 6015(c)(4)(B) as assets that the non requesting spouse transferred to the taxpayer in an effort to avoid taxes. *See id.* at § 3.01(6).

218 *See id.* at § 3.02. According to *id.* at § 3.02(4), "undue hardship" is as defined under § 1.6161-1(b) of the Income Tax Regulations, which provides:

> The term "undue hardship" means more than an inconvenience to the taxpayer. It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer for making payment on the due date of the amount with respect to which the extension is desired. If a market exists, the sale of property at the current market price is not ordinarily considered as resulting in an undue hardship.

Treas. Reg. § 1.6161-1(b) (1999).

If the taxpayer qualifies for relief under section 6015(f) but for the fact that he or she knew or should have known of any portion of the tax owed, he or she will be denied relief only to the extent of that amount.[219] Thus, the taxpayer will be exonerated of any unpaid portions of which he or she did not know or have reason to know. In addition, relief under section 6015(f) is limited to the liability reported on the tax return prior to any subsequent adjustments that may result in an understatement of tax, and is available to the taxpayer only to the extent that the unpaid amount is attributable to his or her spouse.[220]

For individuals who meet the threshold requirements under section 6015(f) but who fail to meet the requirements relating specifically to an unpaid amount that was correctly reported on a joint return, the interim guidelines promulgated by the IRS provide a partial list of factors that may be taken into consideration in determining whether equitable relief under section 6015(f) should still be granted.[221] Relief may be granted if, under the facts and circumstances of the case, it would be inequitable to hold the taxpayer liable for the unpaid amount.[222] Relief is more likely if: the taxpayer is separated, living apart, or divorced from his or her spouse; the taxpayer would suffer hardship if he or she were held liable; the taxpayer suffered abuse from his or her spouse; or under a divorce decree or settlement agreement, the taxpayer's spouse is legally obligated to pay the tax liability or deficiency.[223] Relief is less likely if: the deficiency arises out of an item or liability that is attributable to the taxpayer; the taxpayer knew or had reason to know of the unpaid liability or deficiency; the taxpayer significantly benefited from the liability or items that give rise to the deficiency; or under a divorce decree or settlement agreement, the taxpayer is legally obligated to pay the liability.[224]

3. *Equitable Relief for Innocent Spouses Filing Separate Returns in Community Property States*

In addition to providing equitable relief under section 6015(f) for taxpayers who filed jointly, the 1998 Act amends section 66(c),[225] authorizing the IRS to

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[219] *See* I.R.S. Notice 98-61, at § 3.02(3).

[220] *See id.* at § 3.02(4).

[221] *See id.* at § 3.03.

[222] *See id.*

[223] *See id.* at § 3.03(1).

[224] *See id.* at § 3.01(2).

[225] *See* Internal Revenue Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3201(b), 112 Stat. 685, 739 (1998) (amending I.R.C. § 66(c) (1994)). Section 66(c) originally provided:

grant equitable relief to married individuals who filed *separate returns* in community property states.[226] The IRS is authorized to grant relief for liabilities arising after July 22, 1998, as well as those that remain unpaid as of that date.[227] The same factors weighing for and against equitable relief under section 6015(f) are applicable under section 66(c).[228]

C. *The Innocent Spouse Provision: What Are the Implications?*

Prior to the recently-enacted changes, relief was far too limited under the innocent spouse provision because the rules were too complex and the courts' interpretations too inconsistent. However, even under the newly-expanded rules, the innocent spouse provision fails to provide women with adequate relief from the injustices of joint and several liability. And where the provision does provide some measure of relief, there is too high a price to pay: The provision will affect not only how society views women but how women view themselves, and thus the Tax Code's victimization of women will continue.

> Spouse relieved of liability in certain other cases. Under regulations prescribed by the Secretary, if—
>
> (1) an individual does not file a joint return for any taxable year,
>
> (2) such individual does not include in gross income for such taxable year an item of community income properly includible therein which, in accordance with the rules contained in section 879(a), would be treated as the income of the other spouse,
>
> (3) the individual establishes that he or she did not know of, and had no reason to know of, such item of community income, and
>
> (4) taking into account all facts and circumstances, it is inequitable to include such item of community income in such individual's gross income,
>
> then, for purposes of this title, such item of community income shall be included in the gross income of the other spouse (and not in the gross income of the individual).

Id.

The 1998 Act amended § 66 by adding the following language to subsection (c):

> Under procedures prescribed by the Secretary, if, taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either) attributable to any item for which relief is not available under the preceding sentence, the Secretary may relieve such individual of such liability.

1998 Act, § 3201(b). The language added via this amendment is similar to that contained in § 6015's equitable relief provision. *See* I.R.C. § 6015(f) (West Supp. 1999).

[226] Taxpayers who file jointly in community property states may elect relief under I.R.C. § 6015. *See supra* note 95.

[227] The language used is similar to that of I.R.C. § 6015(f) (West Supp. 1999).

[228] *See* I.R.S. Notice 98-61, at § 1.

1. *Who Will Benefit Under the Innocent Spouse Provision?*

One concern about the newly-expanded rules is that they may benefit most those women who can afford a good divorce lawyer and who are thus better informed of their potential rights under the innocent spouse provision.[229] These women may be better able to negotiate the timing of a divorce or separation so as to meet the deadline—within two years after the IRS commences collection activities—for a separate liability election under Rule II.[230] Likewise, these women may be better able to negotiate the terms of a divorce agreement so that their spouses are legally obligated to pay the taxes owed—one consideration for the courts when determining whether to award equitable relief under Rule III to a taxpayer who does not otherwise qualify for relief under Rules I or II for an unpaid tax deficiency that was correctly reported under a joint return.[231] While in the past, relief was hard to come by for the educated working woman "because courts time and again . . . interpreted 'innocent' to mean hopelessly stupid about money,"[232] it may be this same woman who is most successful at finding relief under the new innocent spouse provisions—rather than those women who are in most desperate need—because she has access to better resources.

2. *The New Innocent Spouse Provision: Merely Furthering the Victimization of Women?*

Under the new innocent spouse provision, a woman who finds relief from joint and several liability will do so only if she establishes that she is naive, uneducated, abused, abandoned, that her marriage has failed, or that the assessment will cause her undue hardship (*i.e.*, that she is a victim). The message to society—that women are helpless—is far too high a price for women to pay, especially considering that the current tax scheme fails married women by allowing them to become victims in the first place, providing them with every *disincentive* to establishing financial independence while offering an incentive to file jointly with their spouses and assume the risk of joint and several liability. Yet another possible message to society, however unsupported the charge may be, is that many women are now empowered to cheat the system—by signing a joint return in order to save on their families' taxes while looking askance from their husbands' business dealings and their reportings to the IRS, only to seek refuge under the innocent spouse provision when necessary to escape liability for

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229 *See supra* note 167.

230 *See supra* Part III.B.2.b.

231 *See supra* Part III.B.2.c.

232 *See* Cummins, *supra* note 25.

an assessment of taxes owed.

More importantly, the innocent spouse provision will affect how women view themselves and may further impact women's choices as to the role they will play in society. In order to find reprieve from joint and several liability, many women will need to establish that they are victims—and in doing so, they will convince *themselves* that they are victims. The "I am a victim" mentality can be emotionally crippling for many women who discover too late that they are financially dependent on their husbands because of the unfortunate choices they made—choices shaped largely by our tax laws.

Broadening the relief available to women from joint and several liability is not the appropriate response to a law that is *itself* inequitable. The more logical response is to repeal joint and several liability and to stop victimizing women in the first place—by taxing them under a scheme that does not discourage them from establishing financial independence and that does not penalize them for choosing to work *and* marry. But if revamping the Code to eliminate the biases against women is too great a step to take, then the least we can do is abolish joint and several liability and replace it with a proportionate liability standard, holding women accountable only for the taxes attributable to their own income.

IV. A NEW DAY AT THE IRS?[233]

Since the enactment of the innocent spouse provision, the IRS has received a flood of applications for innocent spouse relief—at least one thousand per week since February 1999.[234] The applications are piling in on top of a backlog of unresolved cases,[235] approximately two thousand of which had been suspended for review in 1998 until the interim guidelines were issued.[236] While it remains to be seen how well the IRS will manage the applications under the new provisions, there are some indications that little has changed for the agency so far, despite the fact that "[t]he nation's tax collector is getting a kinder, gentler makeover . . . ."[237] And, so, in addition to the indignity of having to establish that they are victims, many women requesting innocent spouse relief may face an uphill battle against the IRS even under the expanded rules.

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233 The Commissioner of Internal Revenue, Charles O. Rossotti, has made assurances "that it is a new day at the IRS." *Internal Revenue Service, supra* note 2, at *13.

234 *See* Karen Hube, *More Aggressive Strategies Will Be Needed to Meet E-filing Goals*, WALL ST. J., June 30, 1999, at A1.

235 *See id.*

236 *See supra* note 173.

237 *See* Curt Anderson, *IRS Operates with a New Sensitivity*, BUFFALO NEWS, Feb. 2, 1999, at E2.

In April, *ABC News* reported that IRS employees who had come forward to testify before the U.S. Senate in September of 1997 did so on the condition of anonymity.[238] They testified behind screens and with their voices disguised, for fear of retaliation should their identities be revealed to the IRS.[239] One IRS employee, Jennifer Long of the Houston district office, however, did speak openly about the abuses committed by her employer.[240] But despite the fact that she was promised protection by the U.S. Senate, her superiors almost immediately sought retaliation.[241] Her performance evaluations went from excellent to poor, and other employees were afraid to associate with her.[242]

In fact, when the IRS's Houston District Office learned that Long had spoken with *ABC News*, she received a sixty-eight-day notice that she must improve her performance or risk dismissal.[243] The notice was subsequently withdrawn by the Commissioner of Internal Revenue, Charles O. Rossotti, when Senator William Roth called him to advise him of Long's situation and to warn him that "[w]e cannot tolerate retaliation."[244] In addition to withdrawing the notice, Rossotti responded by removing the acting director of the Houston district office and sending a team of top Washington officials to Houston to investigate the District Office.[245] Jennifer Long later commented, "I think Mr. Rossotti really does want things to change. But the people, the management, they don't want any part of that."[246] Meanwhile, in a new set of hearings to be held in September 1999, Senator Roth planned to investigate not only the IRS's retaliation against Long but also another serious issue—why the IRS has not been protecting taxpayers in accordance with congressional intent.[247]

In one recent case, a widow by the name of Nancy Johnson discovered that she was left with a total tax debt of nearly $500,000 after her husband died of cancer.[248] She would have been able to pay off her entire renegotiated tax debt if she could have refinanced her $222,000 home on which she owed only

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238 *See 20/20: The New IRS?* (ABC television broadcast, Apr. 23, 1999), transcript *available in* 1999 WL 6790668, at *1.

239 *See id.* at *2.

240 *See id.*

241 *See id.* at *10.

242 *See id.*

243 *See id.*

244 *Id.* (citation omitted).

245 *See id.*

246 *Id.* at *11.

247 *See id.*

248 *See id.* at *4.

$41,000.[249] But both the State of Utah and the IRS had placed liens on the home because of the unpaid taxes, and only Utah agreed to the refinancing—the Utah tax agent believed that Johnson qualified for innocent spouse relief.[250] The IRS, on the other hand, objected to the refinancing plan despite Johnson's application for innocent spouse relief because it "would not protect the full interest of the United States government."[251] As a result, Johnson's home was foreclosed—and sold for $51,000.[252] After the mortgage was paid off, Johnson was left with less than $10,000 to pay the outstanding tax bill.[253] The Utah tax agent commented, "I was truly outraged. And I was outraged, because nobody won on this thing other than the person who bought the home."[254] Her response to the question, "And who lost?" was: "The Internal Revenue Service, the Utah State Tax Commission and especially Nancy Johnson."[255] Johnson sold all of her possessions in a yard sale.[256]

With the emphasis on reform and the recent expansion of the rules, one wonders what problems lie ahead for innocent spouses who petition the government for relief. One problem is that the rules are being applied by the very same agency that targeted "innocent" wives in the first place—the IRS. But even national taxpayer advocate Val Oveson has stated that "[t]axpayer rights are first" and that "it will take time for IRS employees to fully embrace this philosophy, particularly if it means a few dollars less in tax collections."[257] In the meantime, cases are quickly piling up.

V. CONCLUSION

Congress meant well when it enacted the innocent spouse provision. The expanded rules offer reprieve for women who are "innocent" under the law but who would otherwise be jointly and severally liable for tax deficiencies attributable to their husbands. But despite Congress' good intentions, the innocent spouse provision is not the answer. It never has been. By broadening relief under the innocent spouse provision, Congress has merely chosen the

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249 *See id.*

250 *See id.*

251 *Id.* (citation omitted).

252 *See id.*

253 *See id.*

254 *Id.*

255 *Id.*

256 *See id.*

257 *See* Anderson, *supra* note 237 (citation omitted).

lesser of two evils—requiring women to declare themselves victims under one law in order to avoid being victimized under another. Congress has entrusted the administration of innocent spouse cases to the same agency—the IRS—that targeted innocent spouses in the first place, an agency that has yet to prove itself under the new reforms. Ending the blatant discrimination against women under the current tax laws calls for radical change, and at the least calls for one small step toward dignity and equality for women—the repeal of joint and several liability in favor of a proportionate liability standard.